

90-182

No.

Supreme Court, U.S.

FILED

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JOSEPH F. SPANIOL, JR.  
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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1990

V-1 OIL COMPANY,

vs.

*Petitioner,*

STEVEN P. GERBER,

*Respondent.*

PETITION FOR WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS  
FOR THE TENTH CIRCUIT

Law Offices of Andrews & Anderson, P.C.

**F. M. ANDREWS, JR., ESQ.**

**ROBERT O. ANDERSON, ESQ.**

Broadway and Park

Riverton, Wyoming 82501

(307) 856-9279

*Attorneys for Petitioner*

V-1 Oil Company



## **QUESTION PRESENTED FOR REVIEW**

**IS THE ADVICE OF AN ATTORNEY, STANDING ALONE, THAT A STATE STATUTE ALLOWS WARRANTLESS INSPECTION, A SUFFICIENTLY EXTRAORDINARY CIRCUMSTANCE TO ALLOW THE DEFENSE OF QUALIFIED IMMUNITY TO STAND ON SUMMARY JUDGMENT, WHEN THE LAW PROHIBITING SUCH WARRANTLESS INSPECTIONS WAS CLEARLY ESTABLISHED, AND THE ADVICE SOUGHT AND GIVEN DID NOT CONCERN THE CONSTITUTIONALITY OF THE ADMINISTRATIVE SEARCH STATUTE.**

## **LIST OF PARTIES**

All the parties are listed in the case caption.



## TABLE OF CONTENTS

	PAGE
Question Presented For Review .....	i
List of Parties .....	ii
Table of Contents .....	iii
Table of Authorities .....	iv
Opinions Below .....	1
Jurisdiction .....	2
Constitutional Provisions and Statutes Involved ...	2
Statement of the Case .....	5
Reasons for Granting the Writ .....	8
I. Resolution of the Questions is Necessary to settle an Important Federal Law Issue ....	8
II. The Court's Decision is in Conflict With Its Own Prior Holdings and Decisions of The Eighth Circuit Court of Appeals .....	12
Conclusion .....	13
Appendices .....	
A. Opinion of the United States Court of Appeals for the Tenth Circuit in <i>V-1 Oil         Company v. State of Wyoming, Department         of Environmental Quality; Steven P. Gerber,         _____F<sup>2</sup>_____</i> (10th Cir. 1990) .....	A-1
B. Order of the United States District Court Granting Defendant's Motion for Summary Judgment .....	B-1
Certificate of Service .....	
Affidavit of Mailing .....	

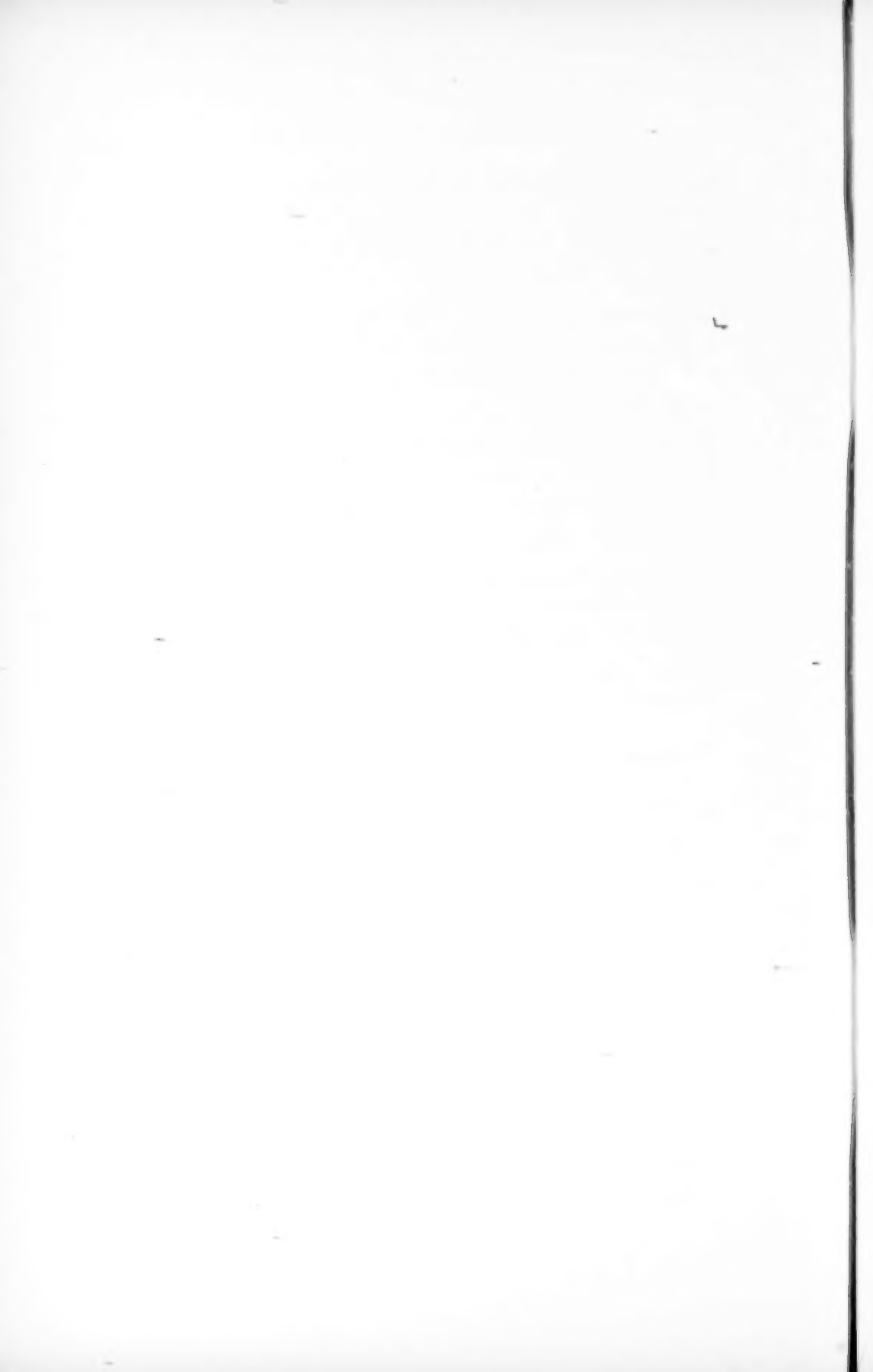
## TABLE OF AUTHORITIES

Cases	PAGE
<i>Alexander v. Alexander</i> , 573 F. Supp. 373, 375, n. 4 (M.D. Tenn. 1983) .....	9
<i>Burk v. Unified School District No. 329</i> , 646 F. Supp. 1557, 1568 (D. Kan. 1986) .....	9, 10, 13
<i>Donovan v. Dewey</i> , 425 U.S. 594, 600, 602, 603 (1981) .....	8, 11
<i>England v. Hendricks</i> , 880 F <sup>2</sup> 281, 284 (10th Cir. 1989) .....	9
<i>Harlow v. Fitzgerald</i> , 457 U.S. 800, 818, 102 S. Ct. 2727, 2738, 2739, (1982) .....	8, 9
<i>Johnston v. Koppes</i> , 850 F <sup>2</sup> 594, 596 (9th Cir. 1988) .....	9
<i>Lavicky v. Burnett</i> , 758 F <sup>2</sup> 468, 476 (10th Cir. 1985) .....	12
<i>Lutz v. Weld County School District</i> , 784 F <sup>2</sup> 340, 342-343 (10th Cir. 1986) .....	10
<i>Marshall v. Barlow's, Inc.</i> 436 U.S. 307, 313-314 (1978) .....	8, 11
<i>Melton v. City of Oklahoma City</i> , 879 F <sup>2</sup> 706, 730-731 (10th Cir.), <i>reh'g. en banc</i> , 888 F <sup>2</sup> 724 (10th Cir. 1989) .....	12
<i>Mitchell v. Forsythe</i> , 472 U.S. 511, 86 L. Ed <sup>2</sup> . 411, 105 S. Ct. 2806 (1988) .....	9
<i>New York v. Burger</i> , 482 U.S. 691 (1987) .....	8, 11
<i>Ortega v. City of Kansas City, Kansas</i> , 659 F. Supp. 1201, 1211, (D. Kan. 1987) .....	10
<i>Powell v. Mikulecky</i> , 891 F <sup>2</sup> 1456, 1457 (10th Cir. 1989) .....	13

	PAGE
<i>See v. City of Seattle</i> , 387 U.S. 541, 546, (1967) .....	8
<i>Tanner v. Hardy</i> , 764 F <sup>2</sup> 1024, 1027, (4th Cir. 1988) .....	9
<i>V-1 Oil Company v. State of Wyoming</i> , <i>Department of Environmental Quality, and</i> <i>Steven P. Gerber</i> , 696 F. Supp. 578 (D. Wyo. 1988) .....	1
<i>V-1 Oil Company v. State of Wyoming</i> , <i>Department of Environmental Quality, and</i> <i>Steven P. Gerber</i> , _____ F <sup>2</sup> _____ (10th Cir. 1990) .....	1
<i>Watertown Equipment Co. v. Norwest Bank of</i> <i>Watertown</i> , 830 F <sup>2</sup> 1487, 1490, 1495 (8th Cir. 1987) .....	9, 10, 13
<i>Wentz v. Klecker</i> , 721 F <sup>2</sup> 244, 247 (8th Cir. 1983) .....	9, 10

### Rules, Statutes and Constitutional Provisions

18 U.S.C. § 1343(3) .....	6
28 U.S.C. § 1254(1) .....	2
28 U.S.C. § 1331 .....	6
42 U.S.C. § 1983 .....	3, 4, 6
Wyo. Stat. § 35-11-109(a) (vi) (1977, Amended 1988) .....	4, 5, 6, 7
Constitution of the United States, Amendment IV .....	2, 7
Constitution of the United States, Amendment V .....	2, 3, 7
Constitution of the United States, Amendment XIV .....	3, 7



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**Supreme Court of the United States**

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V-1 OIL COMPANY,

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*Petitioner,*

STEVEN P. GERBER,

*Respondent.*

---

PETITION FOR WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE TENTH CIRCUIT

---

To the Honorable, The Chief Justice and Associate  
Justices of the Supreme Court of the United States:

V-1 Oil Company, petitioner herein, prays  
that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit entered in this case on April 30, 1990.

**OPINIONS BELOW**

The majority and dissenting opinions of the Court of Appeals for the Tenth Circuit entered April 30, 1990, has not yet been reported. A copy of the opinion is attached. (Appendix A). The opinion of the U.S. District Court is reported at 696 F. Supp. 578 (D. Wyo. 1988). The Order

Granting Defendant's Motion for Summary Judgment was entered September 28, 1988. A copy of the Order is attached. (Appendix B).

## **JURISDICTION**

The Judgment of the United States Court of Appeals was entered on April 30, 1990. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

## **CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED**

The following constitutional provisions and statutes are involved:

### **Constitution of the United States, Amendment IV**

#### **Security from Unwarrantable Search and Seizure**

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

### **Constitution of the United States, Amendment V**

#### **Rights of Accused in Criminal Proceedings**

No person shall be held to answer for a capital, or

otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall he be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

## **Constitution of the United States, Amendment XIV**

### **Section 1. Citizenship Rights Not to Be Abridged by States**

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

### **Title 42 U.S.C. § 1983**

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an

action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

**§ 35-11-109, W.S. 1977, Amended 1988.**

**Powers and duties of director.**

- (a) In addition to any other powers and duties imposed by law, the director of the department shall:

- (vi) Designate authorized officers, employees or representatives of the department to enter and inspect any property, premise or place, except private residences, on or at which an air, water or land pollution source is located or is being constructed or installed, or any premises in which any records required to be maintained by a surface coal mining permittee are located. Persons so designated may inspect and copy any records during normal office hours, and inspect any monitoring equipment or method of operation required to be maintained pursuant to this act at any reasonable time (upon reasonable notice) upon presentation of appropriate credentials, and without delay, for the purpose of investigating actual or potential sources of air, water or land pollution and for determining compliance or noncompliance with this act, and any rules, regulations, standards, permits or orders promulgated hereunder. For surface coal mining operations, right of entry to or inspection of any



operation, premises, records or equipment shall not require advance notice. The owner, occupant or operator shall receive a duplicate copy of all reports made as a result of such inspections within thirty (30) days. The department shall reimburse any operator for the reasonable costs incurred in producing copies of the records requested by the department under this section;

## **STATEMENT OF THE CASE**

### **MATERIAL FACTS**

Petitioner V-1 Oil Company owns and operates a self-service gasoline station in Lander, Wyoming. It sells retail gasoline and liquified petroleum gas to retail customers.

On April 28, 1988, the dirt and concrete had been removed from the top of the gasoline storage tanks preparatory for a pressure test for leaks pursuant to an order of the Wyoming Environmental Quality Council. Respondent Steven Gerber is an engineer with the Department of Environmental Quality, Water Quality Division (DEQ). On April 28, 1988, Mr. Gerber drove by the station and saw concrete being broken out. He thought some storage tanks were being removed and wanted to inspect the work. He could not see the tanks without being on the property. (Gerber Deposition, pp. 16, 17, 27). On that morning while excavation was first in progress, Mr. Gerber came to the excavation site and was asked to leave by the station manager for V-1. The area had been roped off from the general public with barrels, piping and flags. (Evans' Deposition, pp. 15, 24-25; Wood Affidavit, Document No. 15). Mr. Gerber returned about 1:30 p.m. and again was asked to leave the premises by Mr. Leonard Wood, V-1's area manager. Rick Evans, the station manager, on the

same day, told the day worker, Steve Drake, who came on duty at approximately 3:00 p.m., that if any DEQ people came to inspect, they were to be told to stay in the station until he, Rick Evans, could get there. During the day, Gerber had contacted Steve Jones, Assistant Attorney General for Wyoming, who advised him that § 35-11-109(a) (vi) permitted warrantless searches. (Gerber Affidavit, Jones' Affidavit, in support of Motion for Summary Judgment).

Mr. Gerber again returned to the station at 8:20 p.m., when all management people were gone, for the purpose of gathering evidence of a possible DEQ violation. (Gerber Deposition, pp. 16-21). He was accompanied by two people, one of whom was a policeman. He showed the attendant a business card and identified himself. He was told by the station employee he was to stay in the station until Rick Evans, the manager, arrived. Nevertheless, Gerber, claiming he had the authority to inspect "under state law" (Drake Deposition, pp. 7, 11, 13, 22), then proceeded to the excavation site, took a sample of dirt, which he handed to the policeman who had accompanied him, who then left with the sample. When a demand for the return of the sample was made by Mr. Evans, Mr. Gerber stated he did not have the sample. He later retrieved the sample from the policeman. (Gerber Affidavit, Ex. 5).

## **PROCEEDINGS BELOW**

Petitioner V-1 Oil Company brought this action in the United States District Court, District of Wyoming, pursuant to 42 U.S.C. § 1983. Jurisdiction of that Court is based on 42 U.S.C. § 1983, 28 U.S.C. § 1331 and 18 U.S.C. § 1343(3).

Named as defendants were the State of Wyoming, Department of Environmental Quality and Steven P. Gerber, alleging a warrantless search of V-1's premises and

the seizure of a sample of soil, in violation of plaintiff's 4th, 5th and 14th Amendment rights to be free from unreasonable search and seizure and to not be deprived of its property without due process.

Defendants claimed 11th Amendment immunity on behalf of the State and qualified good faith immunity on behalf of Gerber, and further claimed that Gerber was lawfully on the premises under the authority of § 35-11-109(a) (vi) of the Wyoming Environmental Quality Act.

On Motion for Summary Judgment, the Honorable Alan R. Johnson, Judge, granted the State's Motion based on its 11th Amendment immunity. The District Court further found that § 35-11-109(a) (vi) allowed warrantless searches; that the search was reasonable; that there was no clearly established law prohibiting Gerber's actions.

On appeal, the Tenth Circuit Court of Appeals, reversing in part, found that the subject statute authorized warrantless searches, but that the statute did not provide a constitutionally adequate substitute for a warrant; that the law was clearly established and that Gerber's warrantless search violated petitioner's 4th Amendment rights.

The Court then held that Gerber was qualifiedly immune, (Judge Ebel dissenting) on the grounds of extraordinary circumstances, i.e., that the statute had never been tested in any court and that an Assistant Attorney General advised Gerber that the statute authorized warrantless searches. Gerber neither inquired, nor was he advised, that the statute violated the Petitioner V-1's constitutional rights.

The defense of "extraordinary circumstances" was never raised by their Respondent Gerber in the lower Court, nor in the Circuit Court of Appeals. This defense was brought up by the Circuit Court for the first time in its opinion.

## REASONS FOR GRANTING THE WRIT

### I. Resolution of the Questions is Necessary to Settle an Important Federal Law Issue

#### A. Introduction

The law requiring that a statute purporting to permit warrantless searches must provide a constitutionally adequate substitute for a warrant, has long been established. Administrative searches conducted pursuant to statute of general application require a search warrant. *See v. City of Seattle*, 387 U.S. 541, 546 (1967); *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 313-314 (1978). The statute inspection program in terms of certainty and regularity of its application must provide a constitutionally adequate substitute for a warrant. *New York v. Burger*, 482 U.S. 691 (1987), *Donovan v. Dewey*, 425 U.S. 594, 600, 602, 603 (1981). Government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established rights of which a reasonable person would have known. *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 2739 (1982). The test is an objective standard. *Ibid.* at 818, n. 30, 102 S.Ct. 2739, n.30.

... The judge appropriately may determine, not only the current applicable law, but whether that law was clearly established at that time ... if the law was clearly established, the immunity defense will ordinarily fail, since a reasonably competent public official should have known the law governing his conduct. Nevertheless if the official pleading the defense claims extraordinary circumstances, and can prove that he neither knew

nor should have known of the relevant legal standard, the defense should stand.

*Harlow, supra*, at 818, 102 S.Ct. at 2739.

### **B. The Advice of Counsel Alone, Is Not An "Extraordinary Circumstance".**

The question of the advice of counsel constituting a factual defense of extraordinary circumstances has never been decided by the Supreme Court. Indeed, what may or may not constitute "extraordinary circumstances" has never been addressed. Consequently, the law is unsettled and district and circuit courts have applied a variety of rulings to deal with this issue.

Reliance on advice of counsel has upheld the defense of qualified immunity in "perilous" situations, *Tanner v. Hardy*, 764 F<sup>2</sup> 1024, 1027 (4th Cir. 1988), (whether to release or hold juvenile rapist beyond sentence); "unique" situation, *Wentz v. Klecker*, 721 F<sup>2</sup> 244, 247 (8th Cir. 1983), (whether employee entitled to hearing under state law, when law and employee's status as contract employee not clear); law unclear or unsettled, *Mitchell v. Forsythe*, 472 U.S. 511, 86 L.Ed<sup>2</sup>. 411, 105 S.Ct. 2806 (1988), *England v. Hendricks*, 880 F<sup>2</sup> 281, 284 (10th Cir. 1989), *Alexander v. Alexander*, 573 F. Supp. 373, 375, n. 4 (M.D. Tenn. 1983), *Burk v. Unified School District No. 329*, 646 F. Supp. 1557, 1568 (D. Kan. 1986).

The defense of qualified immunity based on advice of counsel has been denied, when law clearly established. *Watertown Equipment Co. v. Norwest Bank of Watertown*, 830 F<sup>2</sup> 1487, 1490 (8th Cir. 1987); advice did not address constitutionality of the dismissal procedure invoked, *Johnston v. Koppes*, 850 F<sup>2</sup> 594, 596 (9th Cir. 1988). Reliance on the advice of counsel alone will not satisfy an official's

burden of acting reasonably. *Wentz v. Klecker*, *supra*, 247, *Watertown Equipment Co. v. Norwest Bank of Watertown*, *supra*, at 1495; advice of counsel in certain circumstances rises to the level of extraordinary circumstances and is an evidentiary issue to be presented to the jury. *Ortega v. City of Kansas City, Kansas*, 659 F. Supp. 1201, 1211, (D. Kan. 1987). *Cf. Burk v. Unified School District No. 329*, *supra*, at 1568, advice of counsel no defense on award of attorney's fees to prevailing plaintiff.

### **C. The Defense Of Extraordinary Circumstances Based On Advice of Counsel Raises a Factual Issue**

In *Lutz v. Weld County School District*, 784 F<sup>2</sup> 340 (10th Cir. 1986), the Tenth Circuit outlined the procedural steps necessary for determining whether a defendant is entitled to the defense of qualified immunity. The defendant must first assert the defense, i.e., that he was performing a discretionary duty. Plaintiff must then prove that the law relied on by plaintiff was clearly established at the time of the alleged deprivation of civil rights. If the Court determines that the law was not clearly established, the Court must enter judgment for the defendant, *id.* at 342-343. If, on the other hand, the plaintiff convinces the Court that the law was clearly established, the Court must proceed to determine whether the defendant has raised a fact issue as to whether "exceptional circumstances" exist such that a reasonable person in his position would not have known of the relevant legal standard. If the defendant raises such a fact issue, the defendant is entitled to a jury instruction on the defense. If no fact issue is raised, the defendant is not entitled to the defense as a matter of law.

In summation, the consensus of the opinions of the various courts lean toward a granting of the defense when



the law was unsettled or the applicable statute unclear, and toward a denial of the defense of qualified immunity when the law was settled, unless the defendant raises a sufficient factual issue of extraordinary circumstances to submit the question to the jury or trier of fact. Advice of counsel appears to be only one element to be considered, when extraordinary circumstances are claimed.

In the case at bar, the Tenth Circuit, without the assertion of the defense of extraordinary circumstances by the defendant, simply found as a matter of law that, although the rights of the plaintiff were clearly settled, per *Donovan v. Dewey*, *supra*, *New York v. Burger*, *supra*, and *Marshall v. Barlow's, Inc.*, *supra*, the fact that the constitutionality of the statute had not been judicially determined by any court, and that although the advice of council was simply that the statute "permitted" warrantless entry, without opinion as to the constitutionality of the statute, constituted an extraordinary circumstance, thereby subverting the plaintiff's right to have the question of reasonableness submitted to a trier of fact.

The advice of counsel even of the dignity of a State's attorney general, coupled with the absence of a prior decision establishing that a specific search statute is unconstitutional, is not such an extraordinary circumstance as to warrant granting qualified immunity. To so hold would negate the force of this Court's historic rulings on the need to protect a clearly established right.

There are literally hundreds of laws which have never been tested for their constitutionality. To allow the defense of advice of counsel that such a law "permits" the proscribed act, would simply eliminate the clearly established right, and render any attorney's opinion an extraordinary circumstance, when the issue of constitutionality is neither requested nor tendered.

Any public employee acting under a warrantless search statute can circumvent "clearly established" rule by pointing out to the trial court that the statute has not been tested or declared unconstitutional and that he acted on advice of counsel. The danger is that counsel is not the person whose reasonableness is being measured.

## **II. The Court's Decision Is In Conflict With Its Own Prior Holdings And Decisions Of The Eighth Circuit Court of Appeals**

### **A. Introduction**

In the case at bar, the Circuit Court held as a matter of law that the petitioner's right not to be inspected without a search warrant pursuant to such a statute as the Wyoming Environmental Quality Act was clearly established. The Court then ruled that extraordinary circumstances "prevented" the respondent from knowing the relevant legal standard. These extraordinary circumstances were: the Assistant Attorney General's advice that the statute permitted such search and that the statute had not been previously tested in any court. Appendix A-14.

The Tenth Circuit Court has previously held that when a duty is unclear, it is a defense that the defendant relied on the advice of the prosecuting attorney's office. *Lavicky v. Burnett*, 758 F<sup>2</sup> 468, 476 (10th Cir. 1985).

The Tenth Circuit Court rejected the defense of advice of counsel in *Melton v. City of Oklahoma City*, 879 F<sup>2</sup> 706, 730-731 (10th Cir.), *reh'g. en banc* granted on other grounds, 888 F<sup>2</sup> 724 (10th Cir. 1989) stating:

Where the law is clearly established, there is no justification for excusing individuals from liability for their actions.



Reliance on legal advice is not a factual dispute, but rather is a legal question of whether counsel's advice was objectively reasonable in light of the prevailing law. *Powell v. Mikulecky*, 891 F<sup>2</sup> 1456, 1457 (10th Cir. 1989).

On the other hand, the Eighth Circuit seems to square with the majority of the District and Circuit Court cases which require advice of counsel to be considered, when the law is unclear and unusual facts exist which would prevent a reasonable person knowing they violated another's constitutional rights. *Burk v. Unified School District No. 329*, *supra*, at 1568 (D. Kan. 1986).

The advice of counsel would not satisfy a defendant's burden of acting reasonably, where the law is clear, except in "unique" or "perilous" situations. *Watertown Equipment Co. v. Norwest Bank of Watertown*, *supra*, at 1495 (8th Cir. 1987).

## CONCLUSION

The Tenth Circuit Court's decision granting qualified immunity on the grounds of advice of counsel coupled with an untested search statute should not be permitted to stand. Such a decision will subvert the long established rule that the defense of qualified immunity is not available in the absence of the extraordinary circumstances. Such extraordinary circumstances must be such that would prevent a reasonable public official from knowing that he is violating the plaintiff's constitutional rights.

For the reasons set forth herein, the petition for a writ of certiorari should be granted.

WHEREFORE, petitioner V-1 Oil Company respectfully requests that its petition for writ of certiorari be granted.

4  
Dated this 19th day of July, 1990.

**LAW OFFICES OF:  
ANDREWS AND ANDERSON, P.C.**

By: 

F. M. Andrews, Jr.  
Broadway and Park  
Riverton, Wyoming 82501  
Telephone: (307) 856-9279  
*Attorney for Petitioner*

**APPENDIX A**  
**88-2691**

**United States Court of Appeals**  
**For the Tenth Circuit**

**SLIP OPINION**

**United States Court of Appeals**  
**FOR THE TENTH CIRCUIT**

*Defendants-Appellees.*

)  
-)  
)  
)  
) No. 88-2691

**(D.C. No. C88-0155-J)**

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F. M. ANDREWS, JR., ANDREWS  
AND ANDERSON, P.C., RIVERTON,  
WYOMING, ATTORNEY FOR PLAIN-  
TIF-APPELLANT.

STEVE C. JONES, SENIOR ASSIS-  
TANT ATTORNEY GENERAL, AND  
KAREN A. BYRNE, SENIOR ASSIS-  
TANT ATTORNEY GENERAL (JO-  
SEPH B. MEYER, ATTORNEY  
GENERAL WITH THEM ON THE  
BRIEFS), CHEYENNE, WYOMING,  
ATTORNEYS FOR DEFENDANTS-  
APPELLEES.

**Appeal from the  
United States Dis-  
trict Court For the  
District of  
Wyoming  
(D.C. NO.  
C-88-0155-J)**

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**Before  
HOLLOWAY,**  
*Chief Judge,*  
**ANDERSON  
and EBEL,**  
*Circuit Judges.*

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**ANDERSON**  
*Circuit Judge.*

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Plaintiff-appellant V-1 Oil Company ("V-1") appeals  
an adverse summary judgment and an award of attorneys'  
fees rendered by the district court. We affirm.

## BACKGROUND

The district court, *V-1 Oil Co. v. Wyoming*, 696 F. Supp. 578 (D. Wyo. 1988), found the following undisputed facts: Defendant-appellee Steven P. Gerber is an official of defendant-appellee the Wyoming Department of Environmental Quality ("DEQ"), an agency of defendant-appellee the State of Wyoming. He was aware that previous investigations of the V-1 Oil Station in Lander, Wyoming revealed that it was a source of groundwater pollution. On April 28, 1988, he noticed, while driving by, that the concrete above the station's underground storage tanks was being removed. Twice he tried to find out what was being done, and twice he was refused permission to enter the property. Informed of this, a senior assistant attorney general tried to obtain a court order allowing Gerber to inspect the premises, but no judge was available. The attorney then advised Gerber that the Wyoming Environmental Quality Act ("the Act") authorized him to conduct a warrantless search. That evening, Gerber, accompanied by a policeman and the Lander City Attorney, returned to the gas station, visually inspected the tanks, and took a soil sample from the exposed area. *Id.* at 579-80.

On May 27, 1988, V-1 filed suit under 42 U.S.C. § 1983, alleging that the search violated V-1's Fourth Amendment rights. The district court granted summary judgment for each defendant. DEQ and the State were dismissed because of their Eleventh Amendment immunity from suit in federal court. *Id.* at 580. V-1 does not appeal this holding. Gerber was deemed entitled to judgment because the statute authorizes warrantless searches, *id.* at 581, such searches are constitutional, *id.* at 582, and Gerber's conduct fell within his qualified immunity because it violated no clearly established right, *id.* at 583. The judgment in favor of Gerber is the subject of No. 88-2691.

The defendants then filed a motion for attorneys' fees under 42 U.S.C. § 1988. They documented the total time spent on the case, but did not state how many hours were spent on each particular issue. *See* R. Vol. I at Tabs 23, 32, 35. In an unpublished order, the court found that V-1's claims against the State and DEQ were frivolous and that for a time V-1 had relied upon an outdated version of the Act, and decided to award the defendants fees for time spent addressing those issues. Order, Jan. 19, 1989, R. Vol. I at Tab 37, at 2-3. V-1 does not appeal these conclusions. The court then estimated that the defendants spent twenty-two hours responding to these claims, and awarded fees based upon that estimate. *Id.* at 2. Whether the court was entitled to estimate how much time was spent on the issues upon which it awarded attorneys' fees, or instead should have required that the movants' records be broken down by issue, is the subject of No. 89-8011.

## **DISCUSSION**

### **I. WARRANTLESS SEARCH**

#### **A. Whether The Wyoming Environmental Quality Act Authorizes Warrantless Searches**

Gerber claims that section nine of the Act authorizes warrantless inspections of suspected sources of pollution. That section empowers certain officers, including Gerber, to

“enter and inspect any property, premises or place, except private residences, on or at which an air, water or land pollution source is located or is being constructed or installed . . . . Persons so designated may . . . inspect any monitoring equipment or method of operation required to be maintained pursuant to this act . . . for the purpose of

investigating actual or potential sources of air, water or land pollution and for determining compliance or noncompliance with this act . . .”

Wyo. Stat. § 35-11-109(a) (vi) (1988).

V-1 contends that this section did not authorize the search which took place, either because it does not authorize warrantless searches or because it only authorizes warrantless searches of monitoring equipment and methods of operation required by the Act, and underground storage tanks do not fall into this category. We disagree.

V-1's first contention seems to be “that a warrant was required since the statute nowhere mentions the words ‘warrantless search.’” *V-1 Oil Co. v. Wyoming*, 696 F. Supp. 578 (D. Wyo. 1988) at 581. Courts do not infer a warrant requirement from statutes which authorize inspections but do not discuss the necessity of warrants. Instead, a bare authorization for inspections is construed to authorize warrantless inspections. See, e.g., *Exotic Coins, Inc. v. Beacom*, 699 P. 2d 930, 940 (Colo.), *Appeal dismissed*, 474 U.S. 892 (1985); *State v. Williams*, 648 P. 2d 1156, 1160-61 (Kan. Ct. App. 1982); *State v. Galio*, 587 P. 2d 44, 47 (N.M. Ct. App. 1978); *State ex rel. Industrial Comm’n v. Wasatch Metal & Salvage Co.*, 594 P. 2d 894, 897 (Utah 1979). We see no reason to believe that the Wyoming Supreme Court would construe this statute any differently.

Second, because the Wyoming Environmental Quality Act should be construed liberally, *People v. Platte Pipe Line Co.*, 649 P. 2d 208, 212 (Wyo. 1982); *Roberts Constr. Co. v. Vondrisk*, 547 P. 2d 1171, 1182 (Wyo. 1976), we hold that underground gasoline storage tanks are a “method of operation required to be maintained pursuant to th[e] act.” The phrase “pursuant to” has a broader meaning than the word “by.” See *Black’s Law Dictionary*



647 (abr. 5th ed. 1983). The statute authorizes the inspection, not only of facilities which the Act specifically requires, but also of any mechanism which is necessary to avoid committing a violation. Without proper storage equipment, gasoline could escape and pollute the surrounding land and groundwater. This is prohibited by, *inter alia*, Wyo. Stat. § 35-11-301 (1988). Therefore, the Act authorized Gerber to inspect V-1's tanks.

### **B. Whether a Warrantless Search Pursuant to the Wyoming Environmental Quality Act is Constitutional**

The warrant requirement of the Fourth Amendment applies to commercial premises. *See v. City of Seattle*, 387 U.S. 541, 543 (1967). An exception to this requirement has developed, however, for "pervasively regulated business[es]," *United States v. Biswell*, 406 U.S. 311, 316 (1972), or " 'closely regulated' industries," *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 313 (1978) (quoting *Colonnade Catering Corp. v. United States*, 397 U.S. 72, 74 (1970)). To be reasonable, the warrantless inspection of such a business must meet the three-part test enunciated in *New York v. Burger*, 482 U.S. 691 (1987):

"First, there must be a 'substantial' government interest that informs the regulatory scheme pursuant to which the inspection is made . . .

Second, the warrantless inspections must be 'necessary to further [the] regulatory scheme.'

Finally, 'the statute's inspection program, in terms of the certainty and regularity of its application, [must] provid[e] a constitutionally adequate substitute for a warrant.' In other words, the regulatory statute must perform the two basic

functions of a warrant: it must advise the owner of the commercial premises that the search is being made pursuant to the law and has properly defined scope, and it must limit the discretion of the inspecting officers. To perform this first function, the statute must be 'sufficiently comprehensive and defined that the owner of commercial property cannot help but be aware that his property will be subject to periodic inspections undertaken for specific purposes.' In addition, in defining how a statute limits the discretion of the inspectors, . . . it must be 'carefully limited in time, place, and scope.' *United States v. Biswell*, 406 U.S., at 315."

*Id.* at 702-03 (quoting *Donovan v. Dewey*, 452 U.S. 594, 600, 602, 603 (1981) ). The two major questions relevant to the constitutionality of Gerber's search are whether V-1 is pervasively regulated and whether the Act provides a constitutionally adequate substitute for a search warrant.<sup>1</sup>

## 1. Whether V-1 Is Pervasively Regulated

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<sup>1</sup> The other two parts of the *Burger* test may be discussed summarily.

V-1 concedes, Appellant's Brief at 1 and we agree, that the protection of the environment and the public from pollution in general, and from leakage from underground gasoline storage tanks in particular, is a substantial governmental interest.

We cannot determine from the record whether warrantless inspections are necessary to the regulatory scheme, i.e., whether there will be times that DEQ cannot obtain a warrant promptly enough for the subsequent search to be effective, see *McLaughlin v. Kings Island*, 849 F. 2d 990, 996 (6th Cir. 1988); *Blackwelder v. Safnauer*, 689 F. Supp. 106, 139 (N.D.N.Y. 1988). Fortunately, such a determination is not necessary to our disposition of this case.

A pervasively regulated industry is one which has "such a history of government oversight that no reasonable expectation of privacy could exist . . . ." *Marshall v. Barlow's, Inc.*, 436 U.S. at 313 (citation omitted). "[T]he doctrine is essentially defined by 'the pervasiveness and regularity of the . . . regulation' and the effect of such regulation upon an owner's expectation of privacy." *New York v. Burger*, 482 U.S. at 701 (quoting *Donovan v. Dewey*, 452 U.S. 594, 606 (1981) ). Pervasively regulated industries "represent the 'exception' rather than the rule." *Marshall v. Horn Seed Co.*, 647 F.2d 96, 99 n.1 (10th Cir. 1981) (quoting *Marshall v. Barlow's, Inc.*, 436 U.S. at 313); see also *McLaughlin v. Kings Island*, 849 F.2d 990,994 (6th Cir. 1988).

Wyoming state law<sup>2</sup> requires a license and payment of a fee before one may do business as a gasoline dealer. Wyo. Stat. § 39-6-203(b) (1988). Violation of this requirement is a misdemeanor. Wyo. Stat. § 39-6-213(a) (1988). The price of the gasoline must be displayed conspicuously, Wyo. Stat. § 39-6-205 (1988), and gasoline tax must be collected, Wyo. Stat. § 39-6-209 (1988). However, while gasoline wholesalers and refiners must submit reports and keep special records, Wyo. Stat. § § 39-6-204, -206, -208 (1989), gasoline dealers face no similar requirement. Under federal law, owners of underground gasoline storage tanks must furnish substantial and detailed information about the tanks and must permit certain inspections<sup>3</sup> and monitoring. See 42 U.S.C. § § 6991-9li.

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<sup>2</sup> Gasoline stations also may be regulated by municipal authorities, Wyo. Stat. § 15-1-103(a) (xxvii) (1988), but the City of Lander has not done so.

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<sup>3</sup> Gerber has not claimed that he was acting pursuant to the federal inspection provision, 42 U.S.C. § 6991d(a). Also, the constitutionality of that provision is not before us.

In *Burger*, the Supreme Court held that New York vehicle dismantlers were pervasively regulated because they were subject to the following circumscriptions: the requirement of a license and payment of a fee; the maintenance and availability for inspection of certain records; the display of the operator's registration number; and the existence of criminal penalties for failure to comply with these provisions. *Burger v. New York*, 482 U.S. at 704-05. The aggregation of requirements to which Wyoming gas stations are subject is equally intrusive, so we affirm the district court's holding that V-1 was pervasively regulated.

## **2. Whether the Statute Provides a Constitutionally Adequate Substitute for a Warrant**

The district court concluded, with no explanation, that the Act provided a constitutionally adequate substitute for a warrant. *V-1 Oil Co. v. Wyoming*, 696 F. Supp. at 582. We disagree. The statute is not so " 'comprehensive and defined that the owner of commercial property cannot help but be aware that his property will be subject to periodic inspections undertaken for specific purposes.' " *Burger v. New York*, 482 U.S. at 703 (quoting *Donovan v. Dewey*, 452 U.S. 594, 600 (1981) ).

First, because the Act applies to every business in Wyoming, it provides no notice whatsoever to the owner of any particular business that his or her property will be subject to warrantless inspections. The only warrantless administrative searches which have been upheld are those conducted pursuant to narrow statutes which regulate particular industries. *Rush v. Obledo*, 756 F.2d 713, 718-19 (9th Cir. 1985); cf. *Marshall v. Barlow's, Inc.*, 436 U.S. at 321. Administrative searches conducted pursuant to statutes

of general applicability require search warrants. *See, e.g., Marshall v. Barlow's, Inc.*, 436 U.S. at 313-14 (Occupational Safety and Health Act); *See v. City of Seattle*, 387 U.S. at 546 (Seattle Fire Code); *Lone Steer, Inc. v. Donovan*, 565 F. Supp. 229, 232 (D.N.D. 1982) (Fair Labor Standards Act), *rev'd on other grounds*, 464 U.S. 408 (1984); *Western Alfalfa Corp. v. Air Pollution Variance Bd.*, 510 P.2d 907, 909-10 (Colo. Ct. App. 1973) (Colorado Air Pollution Control Act), *rev'd on other grounds*, 416 U.S. 861 (1974); *New Mexico Env'tl. Improvement Div. v. Climax Chem. Co.*, 733 P.2d 1322, 1323 (N.M. Ct. App. 1987) (New Mexico Hazardous Waste Act).

Second, the Act provides no "assurance of regularity" of inspections. *Donovan v. Dewey*, 452 U.S. 594, 599 (1981). In both *Burger*, 482 U.S. at 711, and *Dewey*, 452 U.S. at 604, the inspections were conducted on a regular basis. The Wyoming Environmental Quality Act leaves inspectors free to inspect any business as often or seldom as he or she pleases. A warrant is required if searches are "so random, infrequent, or unpredictable that the owner, for all practical purposes, has no real expectation that his property will from time to time be inspected by government officials." *Donovan v. Dewey*, 452 U.S. at 599; *see also Serpas v. Schmidt*, 827 F. 2d 23, 29 (7th Cir. 1987) ("To satisfy the 'certainty and regularity' requirement, an 'inspection program must define clearly what is to be searched, who can be searched, and the frequency of such searches.' "(quoting *Bionic Auto Parts & Sales, Inc. v. Fahner*, 721 F. 2d 1072, 1078 (7th Cir. 1983) ), *cert. denied*, 108 S. Ct. 1075 (1988).

Because the Act does not provide a constitutionally adequate substitute for a warrant, Gerber's warrantless search violated V-1's Fourth Amendment rights.

### **C. Whether Gerber Was Qualifiedly Immune From Suit**

Government officials performing discretionary functions have a qualified immunity from suit.

“[W]hether an official protected by qualified immunity may be held personally liable for an allegedly unlawful official action generally turns on the ‘objective legal reasonableness’ of the action, assessed in light of the legal rules that were ‘clearly established’ at the time it was taken.

....

The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question had previously been held unlawful, but it is to say that in the light of pre-existing law the unlawfulness must be apparent.”

*Anderson v. Creighton*, 483 U.S. 635, 639, 640 (1987) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 819 (1982) ) (citations omitted). “Once a defendant raises the defense of qualified immunity as a defense to an action, ‘[t]he plaintiff carries the burden of convincing the court that the law was clearly established.’ ” *Powell v. Mikulecky*, 891 F. 2d 1454, 1457 (10th Cir. 1989) (quoting *Pueblo Neighborhood Health Centers, Inc. v. Losavio*, 847 F. 2d 642, 645 (10th Cir. 1988) ).

“If the law was clearly established, the immunity defense ordinarily should fail, since a reasonably competent public official should know the law governing his conduct. Nevertheless, if the official pleading the defense claims extraordinary circumstances and can prove that he neither knew nor should have known of the relevant legal standard, the defense should be su-



stained. But again, the defense would turn primarily on objective factors.”

*Harlow v. Fitzgerald*, 457 U.S. 800, 818-19 (1982). The defendant bears the burden of proving such circumstances. See *Pleasant v. Lovell*, 876 F. 2d 787, 794 (10th Cir. 1989).

## **1. Whether The Right Was Clearly Established**

When the search here at issue took place, the *Burger* decision was almost a year old. The *Dewey* decision, upon which *Burger* relied heavily, was almost seven years old. The *Barlow's* decision was almost ten years old. At the same time there was no precedent for the proposition that a generally applicable statute which permitted irregular inspections could constitutionally authorize a warrantless search. We hold that V-1's right not to be inspected without a search warrant pursuant to a statute such as the Wyoming Environmental Quality Act was clearly established.

## **2. Whether Extraordinary Circumstances Existed<sup>4</sup>**

As its name suggests, the “extraordinary circumstances” exception to the rule that a qualified immunity defense fails where the defendant violated a clearly established right applies only “rarely.” *Skevofilax v. Quigley*, 586 F. Supp. 532, 539 n.6 (D. N.J. 1984). The circumstances

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<sup>4</sup> The district court did not address this question. We may consider it, however, because “we are ‘free to affirm a district court decision on any grounds for which there is a record sufficient to permit conclusions of law, even grounds not relied upon by the district court.’” *Griess v. Colorado*, 841 F. 2d 1042, 1047 (10th Cir. 1988) (quoting *Alfaro Motors, Inc. v. Ward*, 814 F. 2d 883, 887 (2d Cir. 1987) ).

must be such that the defendant was so "prevented," *Fernandez v. Leonard*, 784 F. 2d 1209, 1216 (1st Cir. 1986); *Student Servs. for Lesbians/Gays & Friends v. Texas Tech Univ.*, 635 F. Supp. 776, 781 (N.D. Tex. 1986), from knowing that his actions were unconstitutional that "he should not be imputed with knowledge of an admittedly clearly established right," *Robinson v. Bibb*, 840 F. 2d 349, 350 (6th Cir. 1988).

The circumstance most often considered for treatment as "extraordinary" is reliance upon the advice of counsel. See Carey, *Quick Termination of Insubstantial Civil Right Claims: Qualified Immunity and Procedural Fairness*, 38 Vand. L. Rev. 1543, 1444-55 (1985). Of course, such reliance is not inherently extraordinary, for few things in government are more common than the receipt of legal advice. Still, "reliance on the advice of counsel in certain circumstances rises to the level of extraordinary circumstances." *Ortega v. City of Kansas City, Kan.*, 659 F. Supp. 1201, 1211 (D. Kan. 1987), *rev'd on other grounds*, 875 F. 2d 1497 (10th Cir.), *cert. denied*, 110 S. Ct. 325 (1989); *cf. English v. Hendricks*, 880 F. 2d 281, 284 (10th Cir. 1989), *cert. denied*, 110 S. Ct. 1130 (1990); *Lavicky v. Burnett*, 758 F. 2d 468, 476 (10th Cir. 1985), *cert. denied*, 474 U.S. 1101 (1986). *But cf. Powell v. Mikulecky*, 891 F. 2d 1454, 1457-58 (10th Cir. 1989); *Melton v. City of Oklahoma City*, 879 F. 2d 706, 731 (10th Cir.), *reh'g en banc granted*, 888 F. 2d 724 (10th Cir. 1989).<sup>5</sup>

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<sup>5</sup> The dissent errs when it reads *Melton* as a bar to finding Gerber qualifiedly immune. That decision does not address the extraordinary circumstances exception, so it cannot be considered binding authority on the scope of the exception. *Melton* instructs us not to refer to legal advice the defendant received when we decide whether or not the governing law was clearly established; it gives no guidance in deciding when a defendant should not be expected to have known the governing law.



Whether reliance upon legal advice "bars our imputation to [the defendant] of constructive knowledge concerning the laws allegedly violated by his conduct," *Polson v. Davis*, 635 F. Supp. 1130, 1144 (D. Kan. 1986), depends upon the circumstances of each case. Compare *Arnsberg v. United States*, 757 F. 2d 971, 982 (9th Cir. 1984), cert. denied, 475 U.S. 1010 (1985); *Burk v. Unified School Dist. No. 329*, 646 F. supp. 1557, 1568 (D. Kan. 1986); *Wells v. Dallas Indep. School Dist.*, 576 F. Supp. 497, 508 (N.D. Tex. 1983); *Alexander v. Alexander*, 573 F. Supp. 373, 375 n.4 (M.D. Tenn. 1983), *aff'd without opinion*, 751 F. 2d 384 (6th Cir. 1984) with *Watertown Equip. Co. v. Norwest Bank Watertown*, 830 F. 2d 1487, 1495-96 (8th Cir. 1987); *Ortega v. City of Kansas City, Kan.*, 659 F. Supp. at 1211. Relevant factors include how unequivocal, and specifically tailored to the particular facts giving rise to the controversy,<sup>6</sup> the advice was, see *Watertown Equip. Co. v. Norwest Bank Watertown*, 830 F. 2d at 1496; *Ortega v. City of Kansas City, Kan.*, 659 F. Supp. at 1211, whether complete information had been provided to the advising attorney(s), see *Burk v. Unified School Dist. No. 329*, 646 F. Supp. at 1560-61; cf. *Moore v. Marketplace Restaurant, Inc.*, 754 F. 2d 1336, 1348-49 (7th Cir. 1985) (separate opinion of Coffee, J.), the prom-

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<sup>6</sup> We reject the position of the dissent that the advice must be couched in certain-precise legal terms before an official is entitled to rely upon it. See *infra* at \_\_\_\_\_. None of the cases cited above makes that suggestion. Such a requirement cannot be inferred from the statement in *Watertown Equipment* that the defendants were not qualifiedly immune because the advice "did not unequivocally assure [them] of the constitutionality of the South Dakota attachment statute," 830 F. 2d at 1495, because the problem there was not specificity (indeed, just like in the case, the attorney discussed the very statute under which the defendants acted), but equivocation: the attorney told the defendants that there was "'some risk' that [the plaintiff] could successfully attack [the statute's] constitutionality." *Id.* at 1496.

inence and competence of the attorney(s), see *Alexander v. Alexander*, 573 F. Supp. at 375 and n.4; cf. *Johnston v. Koppes*, 850 F. 2d 594, 596 (9th Cir. 1988), and how soon after the advice was received the disputed action was taken, see *Tanner v. Hardy*, 764 F. 2d 1024, 1027 (4th Cir. 1984); *Green v. Brantley*, 719 F. Supp. 1570, 1584 (N.D. Ga. 1989).

We hold that a reasonable officer in Gerber's position—that is, an officer who conducts a warrantless search on the same day he was advised by fully informed, high-ranking government attorneys that a particular statute, which had not yet been tested in any court, lawfully authorized that particular search—should not be expected to have known that the search was unconstitutional. This was not, as the dissent claims, “mere reliance on attorney’s advice” or “attorney’s advice without more.” *Infra* at ———, ———. Because Gerber was prevented by extraordinary circumstances from knowing the relevant legal standard, he is qualifiedly immune.

## II. ATTORNEYS’ FEES

The amount of an award of attorneys’ fees under 42 U.S.C. § 1988 “is particularly within the discretion of the trial court.” *Higgins v. Oklahoma ex rel. Oklahoma Employment Sec. Comm’n* 642 F. 2d 1199, 1203 (10th Cir. 1981). “Accordingly, an attorneys’ fee award . . . will be upset on appeal only if it represents an abuse of discretion. Findings on underlying questions of fact are subject to the clearly erroneous standard of review.” *Mares v. Credit Bur. of Raton*, 801 F. 2d 1197, 1201 (10th Cir. 1986) (citations omitted).

The district court’s finding that twenty-two hours were spent on the issues for which fees were awarded is not clearly erroneous. Nor was it an abuse of discretion to reach that finding by means of estimation, “so long as there

[was] sufficient reason for its use.” *Id.* at 1203. That the court was not granting fees for the entire litigation, but only for an indiscrete portion thereof, is sufficient reason for estimating hours. Other courts have approved similar methods. *See, e.g., Jenkins by Agyei v. Missouri*, 838 F. 2d 260, 264 (8th Cir.), *cert. denied*, 109 S. Ct. 221 (1988); *Aubin v. Fudala*, 821 F. 2d 45, 47 (1st Cir. 1987); *Foster v. Board of School Comm’rs.*, 810 F. 2d 1021, 1023-34 (11th Cir.), *cert. denied*, 484 U.S. 829 (1987); *Evers v. County of Custer*, 745 F. 2d 1196, 1204-05 (9th Cir. 1984). Courts of Appeal have even been known on occasion to estimate how much time particular claims consumed. *See, e.g., Raton Gas Transmission Co. v. FERC*, 891 F. 2d 323, 330-31 (D.C. Cir. 1989); *Ustrak v. Fairman*, 851 F. 2d 983, 989 (7th Cir. 1988).

We have before us a request from the defendants for attorneys’ fees for work done on V-1’s appeal of the fee award. A party who successfully defends a section 1983 action and is awarded attorneys’ fees, then successfully defends an appeal of that fee award, may recover attorney’s fees for services rendered on the appeal. *See Glass v. Pfeffer*, 849 F. 2d 1261, 1266 and n.3 (10th Cir. 1988). The standard for awarding fees remains the same as below; whether the appeal is “‘frivolous, unreasonable, or without foundation.’” *Coverdell v. Department of Social & Health Servs.*, 834 F. 2d 758, 770 (9th Cir. 1987) (quoting *Hughes v. Rowe*, 449 U.S. 5, 14-15 (1980) (per curiam) ). Because the appeal in No. 89-8011 meets this standard, we grant the request and “remand to the district court for the sole and limited purpose of determining a reasonable fee for the time spent defending on appeal the attorney fee award.” *Glass v. Pfeffer*, 849 F. 2d at 1268.

No. 88-2691 is AFFIRMED. No. 89-8011 is AFFIRMED, but REMANDED for a determination of an appropriate attorneys’ fee award.

No. 88-2691 — *V-1 Oil Company v. Wyoming*

## **EBEL, Circuit Judge, dissenting.**

Although I agree with the majority opinion's conclusion that the warrantless search was unconstitutional, I cannot agree with its analysis of the "extraordinary circumstances" basis for qualified immunity. Therefore, I respectfully dissent from the majority's holding that Gerber was protected from suit by qualified immunity. I have four concerns with the majority opinion's reliance on the extraordinary circumstances test in this case.

### **1. Attorney's advice, without more, is insufficient as a matter of law to establish qualified immunity.**

My first concern with the majority's treatment of qualified immunity is that it advances nothing beyond receipt of an attorney's advice to establish the extraordinary circumstances necessary to bestow qualified immunity. As the majority observed, few things in government are more common than the receipt of legal advice. If the Supreme Court intended legal advice, without more, to be sufficient, it surely would have said so in *Harlow*, or it would have used some words other than "extraordinary" circumstances.

Although the Supreme Court has not defined what it meant by extraordinary circumstances, the term itself suggests things such as (1) extreme urgency, (2) an extraordinarily important public interest which justifies precipitous action without careful exploration of the legal underpinnings, or (3) actions by the plaintiff which somehow mislead the defendant or invited the unconstitutional conduct of the defendant. These extraordinary circumstances share a common characteristic, which is not present in mere reliance on attorney's advice, in that they are all

somewhat beyond the control of the defendant and may be objectively measured. Reliance upon attorney's advice is solely within the control of defendants and, if that is all that were required, is vulnerable to manipulation by defendants in order to broaden their qualified immunity far beyond the parameters anticipated by the Supreme Court.

This is not to say that attorney's advice is an irrelevant consideration. I agree with the proposition, found in many of the cases cited by the majority, that attorney's advice is one, but only one, factor to be considered. I would consider it in evaluating the second prong of the extraordinary circumstances test: i.e. whether the defendant can prove that "he neither knew nor should have known of the relevant legal standard." If he received erroneous, but good faith, legal advice that his conduct was permissible, that would tend to show that he neither knew nor should have known that he was violating the clear legal standards, provided that there existed extraordinary circumstances which enhanced the reasonableness of his reliance upon the erroneous legal advice.

Four of the cases cited in the majority opinion purport to discuss receipt of legal advice in the extraordinary circumstances framework. *Watertown Equipment Co. v. Northwest Bank Watertown*, 830 F. 2d 1487, 1495 (8th Cir. 1987), *appeal dismissed and cert. denied*, 486 U.S. 1001 (1988); *Green v. Brantley*, 719 F. Supp. 1570, 1583-84 (N.D. Georgia 1989), *appeal dismissed*, 895 F. 2d 1387 (11th Cir. 1990); *Ortega v. City Of Kansas*, 659 F. Supp. 1201, 1211 (D. Kan. 1987), *rev'd on other grounds*, 875 F. 2d 1497 (10th Cir. 1989); and *Burk v. Unified School District*, 646 F. Supp. 1557, 1568 (D. Kan. 1986). *Cf. Moore v. Marketplace*, 754 F.2d 1336, 1348 (7th Cir. 1985) (receipt of advice from supervisor created extraordinary circumstances).



*Watertown Equipment* and *Green* expressly state that reliance on attorney advice is only one of several factors to be considered in examining qualified immunity. Similarly, in *Ortega*, the court, while not finding the defendants immune under the facts of that case, stated that "reliance on the advice of counsel *in certain circumstances* rises to the level of extraordinary circumstances." *Ortega*, 659 F. Supp. at 1211 (emphasis added). That language suggests that the advice of counsel by itself does not create extraordinary circumstances but that extraordinary circumstances require reliance on counsel plus something more. This appears consistent with the two part nature of the extraordinary circumstances test as articulated by *Harlow*. Only the court in *Burk* states unequivocally that legal advice constitutes extraordinary circumstances. However, in *Burk*, the law was found to be unclear and reliance on the extraordinary circumstances test merely provided an alternative ground for relief. Thus, at most, we are dealing with dicta in that case.

The other cases cited in the majority opinion that discuss reliance on legal advice are not cases involving the extraordinary circumstances defense. Rather, the majority of them merely refer to the attorney's advice as evidence going to whether the law was unclear or not violated. See *Arnsberg v. United States*, 757 F. 2d 971 (9th Cir. 1985) (defendant did not violate clearly established law), *cert. denied*, 475 U.S. 1010 (1986); *Wells v. Dallas Independent School Dist.*, 576 F. Supp. 497, 508-09 (N.D. Tex. 1983) (law unclear); *Alexander v. Alexander*, 573 F. Supp. 373, 376 (M.D. Tenn. 1983) (Attorney advice was used by the court to show that defendant did not violate clearly established law. However, the court notes in footnote 4 that the facts could equally show that defendant neither knew nor should have known the law.), *aff'd*, 751 F. 2d 384 (6th Cir. 1984). Therefore, those cases address the basic *Harlow* test, which we have agreed was satisfied in this case.

## **2. The legal advice received here cannot constitute extraordinary circumstances.**

Second, even assuming that receipt of attorney's advice without more could occasionally rise to the level of extraordinary circumstances, I do not believe the facts of this case justify invocation of the extraordinary circumstances test. The majority opinion makes clear that the plaintiff has satisfied the first *Harlow* test by showing that the defendant has violated a clearly established constitutional right of which a reasonable person would have known. Notwithstanding that fact, the extraordinary circumstance proposed in the opinion that overrides this knowledge is nothing more than legal advice that the requested search was *authorized by Wyoming statute*. Neither the appellate briefs nor the record suggests that the defendant sought or received legal advice that the search would be constitutional under the Fourth Amendment of the United States Constitution. Thus, against the acknowledged backdrop that a reasonable person should have known that this search was *unconstitutional*, the defendant should at least be required to seek and obtain a specific opinion from counsel as to the constitutionality of the search before he can rebut the constructive knowledge of unconstitutionality that is imputed to him by virtue of the plaintiff's satisfaction of the first *Harlow* test.

The qualified immunity cases cited in the majority opinion do not stand for the proposition that legal advice is a generic term and that one size fits all needs. In several of the cases cited there is nothing in the opinion to suggest that the attorney's advice was not directed specifically to the constitutional question at issue. *See, e.g., Arnsberg*, 757 F. 2d at 981 (whether execution of a warrant violated 4th Amendment); *Alexander*, 573 F. Supp. at 378 (whether revocation of commutation of sentence deprived plaintiff

of liberty interest without due process).

The Ninth Circuit in *Johnston v. Koppes*, 850 F. 2d 594 (9th Cir. 1988), found that whether legal advice specifically addressed the constitutionality of the alleged action is one factor to consider in determining whether reliance on that advice gives rise to qualified immunity. See 850 F. 2d at 596. In *Watertown Equipment*, the Eighth Circuit found that reliance on legal advice did *not* establish qualified immunity, in part, because the advice “did not unequivocally assure [defendant] of the constitutionality of the [state statute].” *Watertown Equipment*, 830 F. 2d at 1495.

The district court in *Ortega* similarly found that the defendants were not entitled to qualified immunity because the legal advice relied upon was not sufficiently tailored to the particular acts at issue. *Ortega* was a § 1983 suit based on the violation of a state extradition statute. In *Ortega*, the defendants failed to ask the attorneys the specific factual question of whether mailing notices to out-of-state suspects was proper.

In this case, Gerber failed to ask the specific legal question of whether the search was constitutional but rather he sought, and received, advice directed only to whether such a search was authorized under Wyoming law. Gerber was the Northwest District Supervisor of the Wyoming Department of Environmental Quality, Water Quality Division and his duties included investigating discharges of pollution into groundwater. As a district supervisor with a duty to conduct investigations, he reasonably should have known of the constitutional implications of a warrantless search and should have made sufficient inquiry to have known the clearly established legal test under *Burger* for administrative searches. The record does not establish that Gerber made the necessary inquiry.



**3. The majority's holding is contrary to the Tenth Circuit case of *Melton v. City of Oklahoma City*.**

Third, I believe that the majority opinion is contrary to Tenth Circuit law. The Tenth Circuit authority contrary to the majority's holding is *Melton v. City of Oklahoma City*, 879 F. 2d 706, 730-731 (10th Cir.), *reh'g en banc granted on other grounds*, 888 F. 2d 724 (10th Cir. 1989).<sup>1</sup> In *Melton*, the court held that attorney's advice *cannot* bestow immunity when conduct violates a clearly established right (such as we have found to exist in this case). The court explained:

[The defendant] argues that he relied in good faith on the advice of municipal counsel in sending his letter to [plaintiff], and, therefore, he should be absolved of any personal liability for the consequences of his actions. While superficially attractive, this argument proves too much. Adopting the proffered position would immunize officials from liability via the simple expedient of consulting counsel! In *Harlow*, the Supreme Court sought to protect officials in the good faith exercise of discretion in areas of the law which are not clearly charted. However, where the law is clearly established, there is no justification for excusing individuals from liability for their actions. In sum, officials are pre-

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<sup>1</sup> The other Tenth Circuit cases cited by the majority are inapplicable because none of them deal with a situation where a defendant is seeking to rely on attorney's advice for immunity when his conduct violates clearly established law. See *Powell v. Mickulecky*, 891 F. 2d 1454 (10th Cir. 1989); *England v. Hendricks*, 880 F. 2d 281, 284 (10th Cir. 1989), *cert. denied*, 110 S. Ct. 1130 (1990), and *Lavicky v. Burnett*, 758 F. 2d 468, 476 (10th Cir. 1985), *cert. denied*, 474 U.S. 1101 (1986).

sumed to know and abide by clearly established law. When their actions are otherwise, their claims of qualified immunity will fail.

*Melton*, 879 F. 2d at 730-31. I do not believe that *Melton* should be read so strictly that an individual can never be excused from liability if he acts contrary to clearly established law. See *Harlow*, 457 U.S. at 818-19. However, I do not believe that it can be read so broadly that it would permit finding Gerber immune from suit solely upon reliance on attorney advice.

#### **4. The extraordinary circumstances defense was not raised below.**

Fourth, I believe that it is inappropriate to affirm on the basis of extraordinary circumstances when that theory was not clearly advanced or argued on appeal or, apparently, below. We can affirm on a ground not raised below provided the record is sufficiently clear to permit us to do so and provided that both parties had an adequate opportunity to develop the record on the issue that we choose to rely upon. See *Seibert v. University of Oklahoma*, 867 F. 2d 591, 597 (10th Cir. 1989). Here, I do not believe that the appellant has had a full and fair opportunity to develop in the record the lack of extraordinary circumstances such as urgency or compelling state interest. I also do not believe that appellant has had an adequate opportunity to establish that the legal advice sought and given may have dealt only with the procedural compliance with Wyoming law rather than constitutional issues.

As stated in the majority's opinion, one of the factors in deciding whether counsel's advice can be relied upon is how specific and unequivocal the advice is. Unless we know all of the circumstances of what the defendant sought

from counsel and what the counsel advised, I fear we are deciding this case on an incomplete record and in a way that is unfair to the appellant since we are springing this defense upon it on appeal.

For the reasons stated above, I respectfully dissent from the majority opinion's holding that Gerber was immune from suit.



**APPENDIX B**

**C88-0155-J**

**United States District Court**  
**FOR THE DISTRICT OF WYOMING**

**ORDER**

**B-1**

**APPENDIX B**  
**C88-0155-J**

---

IN THE  
**United States District Court**  
FOR THE DISTRICT OF WYOMING

---

V-1 OIL COMPANY, a Wyoming corporation

*Plaintiff,*

*v.*

STATE OF WYOMING, DEPARTMENT  
OF ENVIRONMENTAL QUALITY, and  
STEVEN P. GERBER,

*Defendants.*

---

**ORDER GRANTING DEFENDANT'S MOTION  
FOR SUMMARY JUDGMENT**

**I. Standard on Summary Judgment**

A party moving for summary judgment has the burden of showing that there is no genuine issue as to any material fact, and that he is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). Summary judgment is appropriate when a moving party points to an absence of evidence to support the nonmoving party's case; a moving party is not required to support its motion with affidavits or other similar materials *negating* the nonmovant's claim. *Celotex Corporation v. Catrett*, 106 S. Ct. 2548, 2553 (1986).

A material fact is one that might affect the outcome of a suit under governing law. *Anderson v. Liberty Lobby, Inc.*,

106 S.Ct. 2505, 2510 (1986). A genuine issue as to a material fact exists when the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *Id.* A moving party is entitled to judgment as a matter of law where the nonmoving party has "failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof." *Celotex*, 106 S.Ct. at 2553. The evidence of the nonmoving party is deemed true and all reasonable inferences are drawn in his favor. *Ander-son*, 106 S.Ct. at 2514. The material facts in this case are undisputed.

## II. Background

Steven P. Gerber is the Northwest District Supervisor for the Wyoming Department of Environmental Quality, Water Quality Division. That district includes Fremont County, Wyoming, the location of Lander, Wyoming. Affidavit of Steven P. Gerber, ¶ 1. As part of Mr. Gerber's duties, he investigates discharges of pollution, such as petroleum products, into groundwater. *Id.* at ¶ 5. On 28 April 1988 Mr. Gerber was aware that the V-1 Oil station in Lander, Wyoming, was a source of gasoline pollution. Investigations previously conducted had indicated that this station was the source of nearby groundwater pollution. *Id.* at ¶¶ 3-4.

On 28 April 1988, at approximately 11:00 a.m., Mr. Gerber drove by the V-1 Oil station in Lander, Wyoming. He noticed that concrete over underground storage tanks was being removed. Mr Gerber stopped and asked Rick Evans, manager of the V-1 Oil station, what they were doing. Mr. Evans refused to say and asked Mr. Gerber to leave. Mr. Gerber left. At approximately 3:15 p.m. Mr. Gerber drove by the station and saw Leonard Wood, area supervisor for V-1 Oil. Mr. Gerber stopped and asked Mr. Wood what they were doing. Mr. Wood refused to say but



stated that Mr. Gerber was not welcome on the property. Mr. Gerber left the property. *Id.* at ¶¶ 7-8.

Throughout the day Mr. Gerber had been on the telephone with Steve Jones, Senior Assistant Attorney General for Wyoming, discussing a possible inspection of the underground storage tank area. *Id.* at ¶ 9. Mr. Jones sought a hearing with either Judge Ranck or Judge Kail, seeking a court order allowing inspection. A sufficiently immediate hearing could not be obtained. Affidavit of Steve Jones, ¶¶ 5-7. Mr. Jones consulted with three other attorneys, and all agreed that Wyo. Stat. § 35-11-109(a) (vi) (Supp. June 1988) permitted a warrantless inspection. *Id.* at ¶¶ 8-9.

At approximately 7:00 p.m. L. M. Chipley, Lander City Attorney, telephoned Mr. Jones about the situation. He agreed with Mr. Jones's interpretation of the statute, and he further agreed that he and a Lander policeman would accompany Mr. Gerber during his inspection. The policeman's presence was to deter violence. *Id.* at ¶ 11.

At approximately 8:20 p.m. Mr. Gerber, Mr. Chipley, and Lt. Metzger entered the V-1 premises. Mr. Gerber identified himself to Steve Drake, the attendant on duty. Mr. Gerber handed him a business card and informed him of the imminent investigation. Affidavit of Steven Gerber at ¶ 13. Acting under instructions, Mr. Drake told Mr. Gerber to wait until Mr. Evans had arrived. Deposition of Steve Drake at p. 29. Mr. Gerber instead inspected the excavation area. The tops of the underground storage tanks had been uncovered, indicating to Mr. Gerber that the tanks were not being removed, but that the tanks and lines leading up to the tanks were being tested for tightness and integrity. Mr. Gerber noticed very strong hydrocarbon odors. Affidavit of Steven Gerber at ¶¶ 14-15. He collected a soil sample from soil around the underground storage tank closest to the station. Lt. Metzger received an acci-

dent call requiring him to leave. After being informed of this call, Mr. Gerber felt that he should also leave. He informed Mr. Drake that he was leaving, but upon request agreed to stay until Rick Evans arrived. Mr. Gerber gave the soil sample to Lt. Metzger as he left. *Id.* at ¶¶ 16-18.

Rick Evans arrived at the station at approximately 8:30 p.m. He told Mr. Gerber to put the soil sample back. Mr. Gerber informed him that Lt. Metzger had the sample. Mr. Evans asked Mr. Gerber to leave, and he did so. *Id.* at ¶¶ 19-23. Mr. Gerber later obtained the soil sample from Lt. Metzger. He stored it for safekeeping at the DEQ office. In accordance with Wyo. Stat. § 35-11-109(a) (vi), Mr. Gerber supplied Mr. Wood and V-1 Oil's attorney with a report of the investigation. *Id.* at ¶ 23.

On 27 May 1988 V-1 Oil filed a complaint in this court under 42 U.S.C. § 1983, alleging deprivation of its rights secured by the fourth, fifth, and fourteenth amendments. Named as defendants were the state of Wyoming, the Department of Environmental Quality, and Steven P. Gerber. On 12 August 1988 defendants filed a motion for summary judgment. In V-1 Oil's brief opposing the motion, it stated that "[t]he defendant State of Wyoming's Motion for Summary Judgment should be granted, pursuant to the State's immunity as provided by the 11th Amendment to the Constitution."<sup>1</sup> The court agrees with this view. The eleventh amendment prohibits suits in federal court against a state or one of its agencies or departments unless consent is shown. *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 100 (1984); *Meade v. Grubbs*, 841 F. 2d 1512, 1524-26 (10th Cir. 1988). No consent has been

<sup>1</sup> At the 9 September 1988 motion hearing, plaintiff's counsel informed the court that he wished to reconsider this concession. The court gave him time to respond in writing. On 26 September 1988 the court received a letter from plaintiff's counsel stating that "I have not found any cases giving the Plaintiff any relief in this matter."

shown. V-1 Oil argues that the suit should proceed against Steven P. Gerber in his individual capacity.<sup>2</sup>

### III. The Warrantless Search

The question arises whether the warrantless search was permissible. In deciding this, the court looks to Wyo. Stat. § 35-11-109(a) (vi), which provides as follows:

(a) In addition to any other powers and duties imposed by law, the director of the department shall:

(vi) Designate authorized officers, employees or representatives of the department to enter and inspect any property, premise or place, except private residences, on or at which an air, water or land pollution source is located or is being constructed or installed, or any premises in which any records required to be maintained by a surface coal mining permittee are located. Persons so designated may inspect and copy any records during normal office hours, and inspect any monitoring equipment or method of operation required to be maintained pursuant to this act at any reasonable time upon presentation of appropriate credentials, and without delay, for the purpose of investigating actual or potential sources of air, water or land pollution and for determining compliance or noncompliance with this act,

---

<sup>2</sup> The eleventh amendment does not bar suit against officials in their individual capacities since “[a] victory in a personal-capacity action is a victory against the individual defendant, rather than against the entity that employs him.” *Meade, v. Grubbs*, 841 F. 2d 1512, 1526 n.16 (10th Cir. 1988) (quoting *Kennedy v. Graham*, 473 U.S. 159, 167-68 (1985) ).

and any rules, regulations, standards, permits or orders promulgated hereunder. For surface coal mining operations, right of entry to or inspection of any operation, premises, records or equipment shall not require advance notice. The owner, occupant or operator shall receive a duplicate copy of all reports made as a result of such inspections within thirty (30) days. The department shall reimburse any operator for the reasonable costs incurred in producing copies of the records requested by the department under this section[.]

Defendant contends that this statute requires a warrant or a court order before an inspection may be made. This court disagrees.

The statute allows inspections under stated conditions. First, under the first sentence of subsection (vi), the inspector must qualify as one entitled to inspect. Mr. Gerber qualifies. Affidavit of Randolph Wood at ¶ 3. Second, provided the inspection is made at any reasonable time upon presentation of appropriate credentials and without delay, such a designated employee may inspect any method of operation required to be maintained pursuant to the Wyoming Environmental Quality Act, Wyo. Stat. § § 35-11-101 through 35-11-1304 (Supp. June 1988). This authority is given to investigate actual potential sources of air, water, or land pollution and to determine compliance or noncompliance with this act, and any rules, regulations, standards, permits, or orders promulgated under it. No one disputes that Mr. Gerber's inspection occurred while the station was open for business. No one disputes that Mr. Gerber presented appropriate credentials and inspected without delay.<sup>3</sup> Because all conditions

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<sup>3</sup> The court simply notes that the requirements of the statute

imposed by the statute were met, the court concludes that the inspection complied with the statute.

Plaintiff V-1 Oil seems to contend that a warrant was required since the statute nowhere mentions the words "warrantless search." In *New York v. Burger*, 107 S.Ct. 2636 (1987), the Court examined a statute allowing inspections in the automobile junk yard industry. The Court concluded that warrantless searches were allowed under the statute even though the words "warrantless search" were not contained within it. *Id.* at 2639 n.1. The Court later noted that "[n]umerous states have provisions for the warrantless inspections of vehicle dismantlers and automobile junk yards" and listed as an example Wyo. Stat. § 31-13-112(e) (1977). *Id.* at 2641 n.11. this Wyoming statute also does not include the words "warrantless search." Having determined that Mr. Gerber was entitled to conduct a warrantless inspection under the Wyoming statute, the court now turns to the issue of whether the warrantless inspection complied with the United States Constitution.

#### **IV. Warrantless Administrative Searches**

The fourth amendment prohibits unreasonable searches and seizures of commercial premises, as well as private homes. *See v. City of Seattle*, 387 U.S. 541, 543 (1967). A business operator's reasonable expectation of privacy in commercial property extends to administrative inspections designed to enforce regulatory statutes.

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were met. The relevant inquiry in a suit under 42 U.S.C. § 1983, however, is whether plaintiff was deprived of a federal right. *See Wise v. Bravo*, 666 F. 2d 1328, 1331 (10th Cir. 1981). That inquiry focuses on whether the statute allows warrantless inspections, not whether its conditions were met.



*Marshall v. Barlow's, Inc.*, 436 U.S. 307, 312-13 (1987). This expectation of privacy in commercial premises is less than the expectation in an individual's home. *Donovan v. Dewey*, 452 U.S. 594, 598-99 (1981). The expectation of privacy in "closely regulated" industries is particularly attenuated. *New York v. Burger*, 107 S.Ct. at 2642. "Certain industries have such a history of government oversight that no reasonable expectation of privacy ... could exist for a proprietor over the stock of such an enterprise." *Id.* (quoting *Marshall*, 436 U.S. at 313). See *New York v. Burger*, 107 S.Ct. 2636 (vehicle dismantlers and automobile junk yards); *Donovan v. Dewey*, 452 U.S. 594 (1981) (stone quarries); *United States v. Biswell*, 406 U.S. 311 (1972) (firearms); *Colonnade Corporation v. United States*, 397 U.S. 72 (1970) (liquor dealers).

Upon fulfillment of three criteria, a warrantless search of a pervasively regulated business will be deemed reasonable. *New York v. Burger*, 107 S.Ct. at 2643-44. First, there must be "a 'substantial' government interest that informs the regulatory scheme pursuant to which the inspection is made." *Id.* at 2644. This is met by health and safety dangers resulting from leaks in underground gasoline storage tanks. Second, "the warrantless inspections must be 'necessary to further [the] regulatory scheme.'" *Id.* (quoting *Donovan v. Dewey*, 452 U.S. at 600). This condition is also met. The State made an effort to obtain a court order. Only after it became obvious that the order could not be obtained while the tanks were exposed did the State abandon that effort. Third, "the regulatory statute must perform the two basic functions of a warrant: it must advise the owner of the commercial premises that the search is being made pursuant to the law and has a properly defined scope, and it must limit the discretion of the inspecting officers." *New York v. Burger*, 107 S.Ct. at 2644 (citing *Marshall*, 436 U.S. at 323). The statute in question does both.

Those engaging in the business of storing and dispensing gasoline have chosen to engage in a pervasively regulated business. Wyoming has passed many laws limiting their conduct. *See, e.g.*, The Wyoming Environmental Quality Act, Wyo. Stat. § § 35-11-101 through 35-11-1304; Wyo. Stat. § § 39-6-201 through 39-6-214 (licensing, taxing, and record keeping of gasoline distributors); Wyo. Stat. § 15-1-103(a) (xxviii) (Cum.Supp. 1988) (The governing bodies of all cities and towns may: Regulate or prevent the storage, use and transportation of any combustible or explosive material within the corporate limits or within a given distance thereof); Wyoming Department of Environmental Quality Rules and Regulations, Water Quality Division, Chapter IV, Regulations for Releases of Oil and Hazardous Substances into Waters of the State of Wyoming. Federal law also pervasively regulates underground storage tanks. *See* 42 U.S.C. § § 6991 through 6991i Cum.Supp. May 1988).<sup>4</sup>

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<sup>4</sup> These statutes require that owners of underground storage tanks (containing petroleum, including crude oil or any fraction thereof, which is liquid at standard conditions of temperature and pressure) provide information relating to the tank's existence, size, type, location, and uses. 42 U.S.C. § 6991a(i). Extremely detailed regulations relating to release detection, prevention, and correction are mandated under the statutes. 42 U.S.C. § 6991b. Of particular interest is the statute governing inspection, monitoring, testing and corrective action, which provides in part as follows:

- (a) **Furnishing information.** For the purposes of developing or assisting in the development of any regulation, conducting any study, [taking any corrective action] or enforcing the provisions of this subtitle [42 USCS § § 6991 et seq.], any owner or operator of an underground storage tank (or any tank subject to study under section 9009 [42 USCS § 6991h] that is used for storing regulated substances) shall, upon request of any officer, employee or repre-



In light of this extensive regulation, the court is puzzled by the attitude of V-1 Oil as expressed in the deposition of its employee, Rick Evans: "We just allow no inspections, no nothing, without permission." "[I]t really

sentative of the Environmental Protection Agency, duly designated by the Administrator, or upon request of any duly designated officer, employee, or representative of a State acting pursuant to subsection (h) (7) of section 9003 [42 USCS § 6991c (h) (7)] or with an approved program, furnish information relating to such tanks, their associated equipment, their contents, conduct monitoring or testing, permit such officer at all reasonable times to have access to, and to copy all records relating to such tanks and permit such officer to have access for corrective action. For the purposes of developing or assisting in the development of any regulation, conducting any study, taking corrective action, or enforcing the provisions of this subtitle [42 USCS §§ 6991 et seq.], such officers, employees, or representatives are authorized—

- (1) to enter at reasonable times any establishment or other place where an underground storage tank is located;
- (2) to inspect and obtain samples from any person of any regulated substances contained in such tank;
- (3) to conduct monitoring or testing of the tanks, associated equipment, contents, or surrounding soils, air, surface water or ground water; and
- (4) to take corrective action.

Each such inspection shall be commenced and completed with reasonable promptness.

42 U.S.C.S. § 6991d(a). The court notes that inspections are not conditioned on obtaining a court order or warrant. The court further observes that the statutes pervasively regulate owners of underground storage tanks such as V-1 Oil's.

shouldn't matter to them. It's our business what we're doing out there." Deposition of Rick Evans at 7, 25. Those views do not conform with the scheme set forth in the statutes.

## V. Qualified Immunity

As an executive official, Steven Gerber is entitled to assert qualified immunity from this suit. See *Scheuer v. Rhodes*, 416 U.S. 232 (1974). In *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982), the Court held that "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." This approach removed subjective good faith from the analysis and centered on objective good faith. Objective good faith "involves a presumptive knowledge of and respect for 'basic, unquestioned constitutional rights.'" *Id.* at 815 (quoting *Wood v. Strickland*, 420 U.S. 308, 322 (1985)).

In *Anderson v. Creighton*, 107 S.Ct. 3034 (1987), the Court further refined its objective good faith analysis. Seeking to avoid a "rule of virtually unqualified liability simply by alleging violation of extremely abstract rights," the Court declared that a violation of a constitutional right would not necessarily defeat qualified immunity. Qualified immunity would still apply, the Court reasoned, unless the "contours of the right [were] sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Id.* at 3039. See also *Watson v. City of Kansas City, Kansas*, No. 86-2501, slip op. at 15-16 (10th Cir. Sept. 14, 1988). Otherwise stated, the question is whether a reasonable official could have believed his conduct lawful "in light of clearly established law and the

information the searching officers possessed." *Anderson v. Creighton*, 107 St.Ct. at 3040.

In this case, there is no clearly established law prohibiting Mr. Gerber's actions. In fact, as this court has found, the law indicates the contrary. The statute does not require a warrant, and warrantless searches of pervasively regulated industries are permissible. Mr. Gerber's duties include investigating discharges of pollution into groundwater. He knew that previous investigations had indicated that V-1 Oil's station was the source of nearby groundwater pollution. He could reasonably expect that the tanks would not long remain exposed. Based upon the status of the law and the information he possessed, the court must conclude that a reasonable official in his position would not understand that he was violating a right. As earlier stated the court does not believe that he did violate a right.

V-1 Oil carries the burden of convincing this court that the constitutional rights relied upon were clearly established. *Pueblo Neighborhood Health Centers v. Losavio*, 847 F.2d 642, 645, (10th Cir. 1988) (citing *Lutz v. Weld County School District*, 784 F. 2d 340, 342-43 (10th Cir. 1986) ). V-1 Oil must do more than merely identify in the abstract a clearly established right and allege that defendant has violated it. *Losavio*, 847 F. 2d at 645 (citing *Anderson v. Creighton*, 107 S.Ct. at 3039 n.2). V-1 Oil has not met these burdens. It is therefore

ORDERED that defendant's motion for summary judgment is GRANTED.

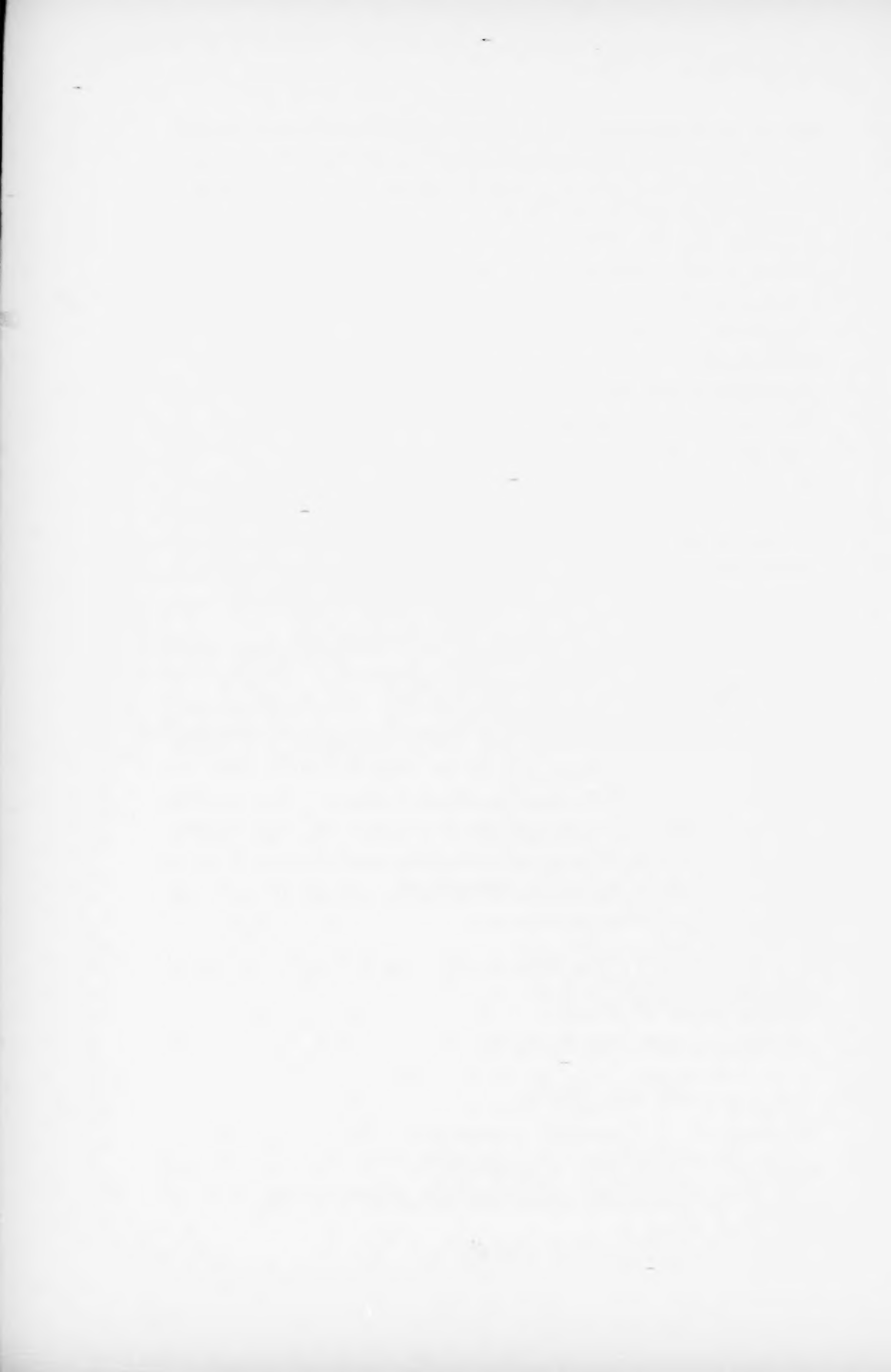
Dated this 28th day of September, 1988.

By the Court:

/s/ ALAN R. JOHNSON

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ALAN R. JOHNSON  
UNITED STATES DISTRICT JUDGE



## CERTIFICATE OF SERVICE

I, F. M. Andrews, Jr., one of the attorneys for the petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 19th day of July, 1990, I served copies of this Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit, by mailing copies in a duly addressed envelope, with first class postage prepaid, to the following attorney of record:

Steve Jones  
Senior Assistant Attorney General  
State of Wyoming  
123 Capitol Building  
Cheyenne, Wyoming 82002  
*Attorney for Respondent*

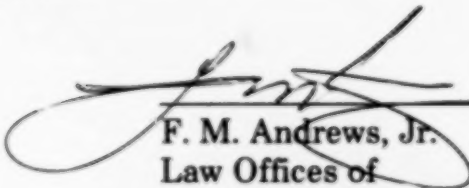
A handwritten signature in black ink, appearing to read 'F. M. Andrews, Jr.', is written over a horizontal line. The signature is stylized with a large, sweeping initial 'F' and a trailing flourish.

F. M. Andrews, Jr.  
Law Offices of  
Andrews and Anderson, P.C.  
Broadway and Park  
Riverton, WY 82501  
Telephone: (307) 856-9279  
*Attorneys for Petitioner*



## AFFIDAVIT OF MAILING

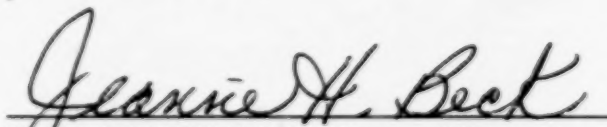
I, F. M. Andrews, Jr., one of the attorneys for the petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 19th day of July, 1990, I deposited in the United States Post Office located at 5th and Main in Riverton, Wyoming, with first class postage prepaid, and properly addressed to the Clerk of the Supreme Court of the United States, within the time allowed for filing, this Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.

  
F. M. Andrews, Jr.  
Law Offices of

Andrews and Anderson, P.C.  
Broadway and Park  
Riverton, WY 82501  
Telephone: (307) 856-9279  
*Attorneys for Petitioner*

STATE OF WYOMING     )  
                                      )     ss.  
COUNTY OF FREMONT    )

SUBSCRIBED AND SWORN to before me at Riverton, Wyoming, this 19th day of July, 1990.

  
NOTARY PUBLIC - State of Wyoming

My commission expires:

1-24-93





②  
No. 90-182

Supreme Court, U.S.  
FILED

AUG 22 1990

JOSEPH F. SPANIOLO, JR.  
CLERK

IN THE  
**Supreme Court of the United States**  
OCTOBER TERM 1990

V-1 OIL COMPANY,  
*Petitioner,*

v.

STEVEN P. GERBER,  
*Respondent and  
Cross-Petitioner*

ON PETITION FOR WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE TENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

JOSEPH B. MEYER  
*Attorney General  
State of Wyoming*

MARY B. GUTHRIE  
*Senior Assistant  
Attorney General  
Counsel of Record*

STEVE JONES  
*Senior Assistant  
Attorney General  
State of Wyoming*

123 Capitol Building  
Cheyenne, Wyoming 82002  
(307) 777-7841

*Attorneys for Respondent  
and Cross-Petitioner  
Steven P. Gerber*

### **QUESTION PRESENTED**

**Is Respondent Gerber, who made a warrantless inspection of underground storage tanks at a retail gasoline station, entitled to claim qualified immunity from suit under 42 U.S.C. §1983, based upon extraordinary circumstances?**

**LIST OF PARTIES**

V-1 Oil Company, a Wyoming corporation, brought this matter before the United States Supreme Court on a petition for writ of certiorari.

Steven P. Gerber is named in his individual capacity as the Respondent. Mr. Gerber has also brought this matter before the United States Supreme Court on a cross-petition for writ of certiorari, which is filed separately.

## TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED .....	i
LIST OF PARTIES .....	ii
TABLE OF CONTENTS .....	iii
TABLE OF AUTHORITIES .....	iv
OPINIONS BELOW .....	1
JURISDICTION .....	2
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED .....	2
STATEMENT OF THE CASE .....	4
REASONS FOR DENYING THE WRIT .....	5
I. The Writ Of Certiorari Should Be Denied Because The Issue Presented Is Limited In Scope And Is Consistent With Existing Case Law .....	6
II. Factual Disputes Do Not Present A Reason To Grant Certiorari .....	8
III. There Is No Conflict Between The Circuit Court Of Appeals On The Issue Of Extraordinary Circum- stances .....	9
CONCLUSION .....	11

## TABLE OF AUTHORITIES

CASES:	Page
<i>Alfaro Motors, Inc. v. Ward</i> , 814 F.2d 883 (2nd Cir., 1987) .....	8
<i>Berenyi v. Immigration Director</i> , 385 U.S. 630 (1967) .....	9
<i>Burk v. Unified School District</i> , 646 F.Supp. 1557 (D. Kan. 1986) .....	6
<i>Davis v. United States</i> , 417 U.S. 333 (1974) .....	11
<i>Graver Manufacturing Co. v. Linde Company</i> , 336 U.S. 271 (1949) .....	9
<i>Griess v. Colorado</i> , 841 F.2d 1042, (10th Cir., 1988) .....	8
<i>Harlow v. Fitzgerald</i> , 457 U.S. 800 (1982) .....	7
<i>Malley v. Briggs</i> , 475 U.S. 335 (1986) .....	7
<i>Melton v. City of Oklahoma City</i> , 879 F.2d 706 (10th Cir.) .....	10
<i>Moore v. Marketplace Restaurant, Inc.</i> , 754 F.2d 1336 (7th Cir., 1985) .....	7
<i>Railway Labor Executives Association v.</i> <i>Staten Island Railroad</i> , 792 F.2d 7 (2nd Cir., 1986) cert. denied, 479 U.S. 1054 (1987) .....	8
<i>Roger v. Lodge</i> , 458 U.S. 613 (1982) .....	9
<i>Tubbesing v. Arnold</i> , 742 F.2d 401 (8th Cir., 1984) .....	6
<i>United States v. Johnston</i> , 268 U.S. 220 (1925) .....	8
<i>V-1 Oil Company v. State of Wyoming, et al.</i> , 696 F.Supp. at 579 .....	9

<i>V-1 Oil v. State of Wyoming, et al.</i> , 902 F.2d 1482 (10th Cir., 1990) .....	9, 10
<i>Watertown Equip. Co. v.</i> <i>Norwest Bank Watertown</i> , 830 F.2d 1487 (8th Cir., 1987) .....	6, 9, 10
<i>Wentz v. Klecker</i> , 721 F.2d 244 (8th Cir., 1983) .....	6
<i>Wisniewski v. United States</i> , 353 U.S. 901 (1957) .....	11

#### CONSTITUTION:

U.S. Const., amend. IV .....	2
U.S. Const., amend. XIV, sec. 1 .....	2

#### STATUTES AND RULES:

WYO. STAT. §35-11-109 (Supp. 1988) .....	3
WYO. STAT. §35-11-109(a)(vi) (Supp. 1988) ....	5, 8
28 U.S.C. §1254(1) .....	2
42 U.S.C. §1983 .....	i, 3, 5, 7
Rule 10 of the Rules of the Supreme Court of the United States .....	6





No. 90-182

IN THE  
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OCTOBER TERM 1990

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V-1 OIL COMPANY,  
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Cross-Petitioner*

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**BRIEF IN OPPOSITION TO V-1 OIL COMPANY'S PETITION  
FOR WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE TENTH CIRCUIT**

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Respondent Steven P. Gerber respectfully requests that the Petition for Writ of Certiorari of Petitioner V-1 Oil Company be denied, and that no further review of the judgment and opinion of the United States Court of Appeals for the Tenth Circuit entered in this matter on April 30, 1990 be made.

**OPINIONS BELOW**

On September 28, 1988, the U.S. District Court for the District of Wyoming issued its decision in this matter, which has been recorded at 696 F.Supp. 578 (D. Wyo. 1988). V-1 Oil Company appealed the decision of the District Court to the Tenth Circuit to the Court of Appeals. The opinion of the Court of Appeals is reported at 902 F.2d 1482 (10th Cir., 1990). A copy of the Tenth Circuit opinion has been attached

to the Petitioner's Petition for Writ of Certiorari as Appendix A. A copy of the opinion of the U.S. District Court is attached to the Petitioner's Petition for Writ of Certiorari as Appendix B.

### **JURISDICTION**

The judgment of the United States Court of Appeals for the Tenth Circuit was entered on April 30, 1990. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1). V-1 Oil Company's Petition for Writ of Certiorari was filed in the U.S. Supreme Court on July 23, 1990. It was received by the Respondent at the Office of the Wyoming Attorney General on July 23, 1990.

### **CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED**

The following constitutional provisions and statutes are involved:

#### **United States Constitution, Amendment IV**

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

#### **United States Constitution, Amendment XIV, Section 1**

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny

to any person within its jurisdiction the equal protection of the laws.

**Title 42 U.S.C. §1983**

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

**WYO. STAT. §35-11-109 (Supp. 1988)**

**Powers and duties of director.**

(a) In addition to any other powers and duties imposed by law, the director of the department shall:

(vi) Designate authorized officers, employees or representatives of the department to enter and inspect any property, premise or place, except private residences, on or at which an air, water or land pollution source is located or is being constructed or installed, or any premises in which any records required to be maintained by a surface coal mining permittee are located. Persons so designated may inspect and copy any records during normal business office hours, and inspect any monitoring equipment or method of operation required to be maintained pursuant to this act at any reasonable time (upon reasonable notice) upon presentation of appropriate credentials, and without delay, for the purpose of investigating actual or potential sources of air, water or land pollution and for determining compliance or non-compliance with this act, and any rules, regulations, standards, permits or orders promulgated hereunder. For surface coal mining operations, right of entry to or inspection of any operation, premises, records or equipment

shall not require advance notice. The owner, occupant or operator shall receive a duplicate copy of all reports made as a result of such inspections within thirty (30) days. The Department shall reimburse any operator for the reasonable costs incurred in producing copies of the records requested by the department under this section.

### STATEMENT OF THE CASE

On April 28, 1988, at a retail gasoline station owned by Petitioner V-1 Oil Company in Lander, Wyoming (hereinafter "the V-1 station"), Steven P. Gerber made an inspection of underground storage tanks.

Mr. Gerber is the Northwest District Supervisor for the Wyoming Department of Environmental Quality, Water Quality Division. His duties include investigating discharges of pollution, including petroleum products, into surface water or groundwater within the State in order to determine if the Wyoming Environmental Quality Act has been violated. Mr. Gerber was aware that the V-1 station was a potential source of gasoline pollution, because samples of groundwater which had been taken from wells located hydrologically downgradient from the V-1 station had revealed the presence of gasoline product.

The V-1 station, a self service gasoline station which sells gasoline to retail customers, is open to the public during normal business hours from 7:00 a.m. until 9:00 p.m. daily. In addition to selling gasoline, the V-1 station also sells liquid propane and groceries and operates a video movie rental business.

When Steve Drake, an employee of V-1 Oil, came on duty at the station at 3:00 p.m. on April 28, 1988, Rick Evans, the station manager, told Mr. Drake to notify him if anyone wanted to "look at dirt or whatever" and that "DEQ might come by and look at it." At approximately 8:20 p.m., Mr. Gerber, acting on the advice of an assistant attorney general for the State of Wyoming, walked onto the V-1 station premises, identified himself as an employee of the DEQ and

advised Mr. Drake that he was there to conduct an inspection of the premises pursuant to state statute.

Mr. Gerber inspected the area where the underground storage tanks, containing gasoline, were located. He noted that although the tanks had been uncovered they were being prepared for testing, and not removal. Mr. Gerber also smelled strong hydrocarbon odors in the excavation area. Mr. Gerber collected a sample of soil near one of the underground storage tanks. Shortly thereafter, he left the area. The entire incident lasted approximately ten minutes.

Mr. Gerber subsequently supplied Mr. Leonard Wood, regional manager for V-1 Oil, and V-1 Oil's attorney with a report of the investigation that occurred that day. A fuller account of the facts was accurately set forth by the District Court in its opinion, 696 F.Supp. at 579.

In presenting its Motion for Summary Judgment, the State argued that V-1 Oil had not been deprived of a constitutional right, but even if it had, that Respondent Gerber was entitled to assert the defense of good faith qualified immunity, because he had presented affidavits documenting the fact that he had relied upon advice of an assistant attorney general for the State for Wyoming, who had told him that he "could conduct a lawful and justifiable entry and inspection upon the V-1 station premises in order to investigate actual or potential sources of pollution . . . ." V-1 Oil asserts that Mr. Gerber was not entitled to immunity because his counsel's advice did not relate to the constitutionality of the statute which permitted him to make his investigation without a warrant. WYO. STAT. §35-11-109(a)(vi), (Supp. 1988). However, record does not support the Petitioner's assertion.

#### REASONS FOR DENYING THE WRIT

The Tenth Circuit Court of Appeals concluded that Respondent Gerber was entitled to claim the defense of good faith qualified immunity in a civil rights lawsuit brought by the Petitioner pursuant to 42 U.S.C. §1983. It came to this con-

clusion even though it agreed with the Petitioner's position that the law was clearly established that Respondent Gerber needed to obtain a search warrant prior to entering the commercial premises of the Petitioner. However, the Tenth Circuit decided that extraordinary circumstances allowed Mr. Gerber to justifiably claim good faith qualified immunity, because Mr. Gerber followed the advice of a government attorney and because the Wyoming statute had never been ruled upon by any court.

### Introduction

While this case presents some issues of national importance (see Cross-petition for Writ of Certiorari presented by the Cross-petitioner), the reasons presented by the Petitioner do not justify a grant of certiorari. The issues raised by the Petitioner are extraordinarily limited and have no applicability outside the narrow context of this case.

There are no important or special reasons as required by Rule 10 of the Rules of the Supreme Court of the United States to grant the writ of certiorari.

### I.

THE WRIT OF CERTIORARI SHOULD BE  
DENIED BECAUSE THE ISSUE PRESENTED IS  
LIMITED IN SCOPE AND IS CONSISTENT WITH  
EXISTING CASE LAW.

The Tenth Circuit's decision was correct and consistent with existing case law. The decision should be allowed to stand.

It has often been held that a defendant may be entitled to qualified immunity if he relied in good faith on the advice of counsel. *Tubbesing v. Arnold*, 742 F.2d 401, 407 (8th Cir., 1984), *Wentz v. Klecker*, 721 F.2d 244, 247 (8th Cir., 1983), *Watertown Equipment Co. v. Norwest Bank Watertown*, 830 F.2d 1487, 1495 (8th Cir., 1987), and *Burk v. Unified School District*, 646 F.Supp. 1557, 1568 (D. Kan. 1986). Cf. *Moore*



*v. Marketplace Restaurant, Inc.*, 754 F.2d 1336, 1348 (7th Cir. 1985).

The defense of good faith qualified immunity serves the salutary purpose of bringing a quick end actions brought pursuant to 42 U.S.C. §1983 which should never have been filed in the first place. See *Harlow v. Fitzgerald*, 457 U.S. 800 (1982) and *Malley v. Briggs*, 475 U.S. 335 (1986). Such was the case here.

The principle articulated by the Tenth Circuit in the case at bar does no more than flesh out the principle articulated in *Harlow v. Fitzgerald*, *supra*, that extraordinary circumstances may justify a good faith qualified immunity defense. 457 U.S. at 819. Because this principle is only a narrow aspect of the qualified immunity defense, review of such a limited issue would not be an efficient use of the Court's time.

Reliance on the advice of counsel by government employees, as part of the defense of good faith qualified immunity, makes good sense. It is an obvious indication of the good faith of the Respondent that he sought legal advice prior to taking any action that might have deprived a potential plaintiff of its constitutional rights. In this case, the Tenth Circuit Court of Appeals concluded that, even though the right of the Petitioner not to be inspected without a search warrant was clearly established, extraordinary circumstances nevertheless existed. Those circumstances were Mr. Gerber's reliance on the advice of a fully informed high-ranking government attorney concerning a particular statute which had never been ruled upon by any court. By virtue of such extraordinary circumstances, Respondent Gerber was prevented from knowing the relevant legal standard, and thus was able to rely on his defense of good faith qualified immunity. See 902 F.2d at 1489.

As the Supreme Court noted in *Malley v. Briggs*, 475 U.S. 335 (1986), "the qualified immunity defense . . . provides ample protection to all but the plainly incompetent or those who knowingly violate the law." 475 U.S. at 341. Respondent Gerber sought the advice of a fully-informed high-



ranking government attorney prior to commencing any inspection of the V-1 station. He followed the advice he was given. He conducted his inspection within the strictures of the inspection statute, WYO. STAT. §35-11-109(a)(vi) (Supp. 1988). Because he did not knowingly violate the law, the Tenth Circuit decision was correct and should be allowed to stand.

## II.

### FACTUAL DISPUTES DO NOT PRESENT A REASON TO GRANT CERTIORARI.

A writ of certiorari is not typically granted to review evidence or to discuss specific facts. *United States v. Johnston*, 268 U.S. 220, 227 (1925). V-1 Oil Company has argued that the question of whether or not extraordinary circumstances existed in this case is a question which should have been submitted to a jury.

A jury was not involved in this matter, since it was appealed to the Tenth Circuit after the grant of a motion for summary judgment. The Tenth Circuit Court of Appeals could have chosen to remand the case and have it heard by a jury. But it did not do so. The Tenth Circuit was able to conclude that extraordinary circumstances existed, based upon the facts before it.

It is true that the defense of "extraordinary circumstances", so denominated, was not raised. But circuit courts of appeal may affirm a district court's opinion on any grounds for which there is a record sufficient to permit conclusions of law, even though those grounds might not have been relied upon by the district court itself. See *Griess v. Colorado*, 841 F.2d 1042, 1047 (10th Cir., 1988); *Alfaro Motors, Inc. v. Ward*, 814 F.2d 883, 887 (2nd Cir., 1987) and *Railway Labor Executives Association v. Staten Island Railroad*, 792 F.2d 7, 12 (2nd Cir., 1986), cert. denied, 479 U.S. 1054 (1987).

In this case, the factual determinations of the district court are wholly consistent with the factual findings of the Tenth

Circuit Court of Appeals. See *V-1 Oil Company v. State of Wyoming, et al.*, 696 F.Supp. at 579 and *V-1 Oil Company v. State of Wyoming, et al.*, 902 F.2d at 1484. V-1 Oil's Petition does disclose any discrepancies in factual interpretations. Under such circumstances, the United States Supreme Court should not undertake to review findings of fact where two courts below have concurred in those findings of fact. *Graver Manufacturing Co. v. Linde Company*, 336 U.S. 271, 275 (1949), *Berenyi v. Immigration Director*, 385 U.S. 630, 635 (1967) and *Rogers v. Lodge*, 458 U.S. 613, 623 (1982). There is no "obvious or exceptional" reason present here to review concurrent findings of fact by two courts below.

There is no need for this Court to review the factual findings nor to hold that a jury should be allowed to hear certain facts. Two courts have held that the material facts are not disputed. There is no genuine issue as to those facts. A review of such issues by the U.S. Supreme Court would result in an improper use of the Court's time and resources.

### III.

#### THERE IS NO CONFLICT BETWEEN THE CIRCUIT COURTS OF APPEALS ON THE ISSUE OF EXTRAORDINARY CIRCUMSTANCES.

While a conflict between circuit courts of appeal is one of the reasons set forth in Rule 10 for granting a writ of certiorari, such a conflict is not presented in this case.

The only inter-circuit conflict which has been suggested by the Petitioner is between the instant case and *Watertown Equipment Co. v. Norwest Bank Watertown*, 830 F.2d 1487 (8th Cir., 1987). However, the decision in *Watertown, supra*, is wholly consistent with the Tenth Circuit decision. Both Courts agree that "extraordinary circumstances" can be the basis for granting qualified immunity:

Although *Harlow* establishes an objective test — whether the law was clearly established — it does provide under certain "extraordinary circumstances," the objective

standard may not end the qualified immunity inquiry. See 457 U.S. at 819, 102 S.Ct. at 2738 . . .

830 F.2d at 1495.

This is the same position taken by the Tenth Circuit. See 902 F.2d at 1488-89. While the court in *Watertown*, *supra*, reached a different conclusion regarding qualified immunity in that case, it did so because of the particular facts of the case. In *Watertown*, *supra*, the Eighth Circuit rejected the defense of qualified immunity, based upon reliance on the advice of counsel, because the advice was equivocal and the factual situation presented was not either perilous or one which clearly demanded prompt action. See 830 F.2d at 1496.

In the case at bar, the situation was clearly one that demanded prompt action. Respondent Gerber had to make the inspection within a certain period of time, or there was a grave risk that the ability to inspect the premises while the underground storage tanks were uncovered would be lost. See 696 F.Supp. at 583.

The cases of *V-1 Oil v. State of Wyoming, et al.* 902 F.2d 1482 (10th Cir., 1990) and *Watertown Equipment Co. v. Norwest Bank Watertown*, 830 F.2d 1487 (8th Cir., 1987) are quite consistent. They cite the same law in arriving at their conclusions. They arrive at different conclusions, but that is because the facts of each case are significantly different enough to justify the different conclusion in each case. There is no direct conflict between the Circuits on this question.

The Petitioner has also alleged that there is an intra-circuit conflict within the Tenth Circuit on the subject of "extraordinary circumstances." But this is not borne out by a review of the Tenth Circuit case law. The only arguable conflict would be with the case of *Melton v. City of Oklahoma City*, 879 F.2d 706, 731 (10th Cir.), *reh' en banc granted* 888 F.2d 724 (10th Cir., 1989). But the Court in *Melton* did not specifically explore the question of extraordinary circumstances. As the Tenth Circuit noted in footnote 5:

*Melton* instructs us not to refer to legal advice the defendant received when we decide whether or not the governing law was clearly established; it gives no guidance in deciding when a defendant should not be expected to have known the governing law.

In any event, a conflict between decisions rendered by different panels of the same circuit court of appeals is generally not a sufficient basis for granting a writ of certiorari. *Davis v. United States*, 417 U.S. 333, 340 (1974). Such conflicts are generally considered an intramural matter which need not be resolved by the U.S. Supreme Court. See *Wisniewski v. United States*, 353 U.S. 901 (1957).

### CONCLUSION

The petition for writ of certiorari submitted by V-1 Oil Company sets forth no important issues of federal law to be resolved and has not shown an actual conflict between the circuit courts of appeal on the issue on which it seeks review. Petitioner's argument that a particular factual issue should be submitted to a jury for resolution is also not appropriate for review by the U.S. Supreme Court.

Respectfully submitted,

JOSEPH B. MEYER  
*Attorney General*

MARY B. GUTHRIE\*  
*Senior Assistant  
Attorney General*

STEVE JONES  
*Senior Assistant  
Attorney General*

123 Capitol Building  
Cheyenne, Wyoming 82002  
(307) 777-7841

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\* Counsel of Record